87-1938

No. 87-

In the Supreme Court of the United States

OCTOBER TERM, 1987

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

STATE OF TEXAS, ET AL., RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether the court below vitiated the holding of this Court in *Service Storage & Transfer Co. v. Virginia*, 359 U.S. 171 (1959)–and failed its duty to protect exclusive Federal jurisdiction to interpret and supervise motor carrier operating authority issued by the Interstate Commerce Commission–by declining to enjoin an ongoing State prosecution against operations authorized by the ICC (pending Federal judicial review of the ICC's decision).

PARTIES TO THE PROCEEDING

The following parties have appeared in the proceedings before the Court of Appeals below:

State of Texas
Montana Department of Public Service Regulation
Montana Public Service Commission
Public Utilities Commission of the State of California
Alabama Public Service Commission
Great Western Trucking Co., Inc.
Steere Tank Lines, Inc.
National Association of Regulatory Utility Commissioners
The National Industrial Transportation League
Regular Common Carrier Conference
International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America
National-American Wholesale Grocers' Association
National Motor Freight Traffic Association
Armstrong World Industries, Inc.
Reeves Transportation Company of Georgia
Interstate Commerce Commission
United States of America

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Interstate Commerce Commission petitions for a writ of certiorari to review, and summarily reverse, the decision of the United States Court of Appeals for the Fifth Circuit denying its Motion for Preliminary Injunction.

OPINIONS BELOW

The opinion of the circuit court (App. A, 1a-6a, *infra*) is reported at 837 F.2d 184 (1988). The order denying rehearing (App. B, 7a, *infra*) is unreported, and the court's rejection of a request for *en banc* consideration was transmitted by letter (App. C, 8a, *infra*).

JURISDICTION

The judgment of the circuit court was entered February 1, 1988; the order denying rehearing was entered March 8, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

[1] The Solicitor General has not authorized the filing of this petition. The ICC is authorized to file this petition under 28 U.S.C.

STATUTES INVOLVED

Pertinent provisions of the United States Constitution, Art. I, sec. 8, cl. 3 (Commerce Clause) and Art. VI, cl. 2 (Supremacy Clause); the All Writs Act, 28 U.S.C. 1651; the Administrative Orders Review Act, 28 U.S.C. 2342 and 2349; and the Interstate Commerce Act, 49 U.S.C. 10521 and 10921 are set forth in Appendix D (9a-11a), *infra*.

STATEMENT OF THE CASE

1. The Interstate Commerce Commission has jurisdiction over *inter*state transportation by motor carriers. 49 U.S.C. 10521(a)(1)(A). To conduct such operations, a carrier must obtain an appropriate certificate from the ICC pursuant to 49 U.S.C. 10921. States retain authority to regulate wholly *intra*state transportation. 49 U.S.C. 10521(b)(1).

In the event of a dispute over whether particular operations are part of interstate transportation licensed by the ICC or constitute intrastate transportation for which State authority is required, this Court has held that the interpretation of the carrier's interstate authority should be made by the ICC[2] *before* the State attempts to prosecute a carrier for unlawful intrastate transportation. *Service Storage & Transfer Co., Inc. v. Virginia*, 359 U.S. 171 (1959). *Accord, Jones Motor Co., Inc. v. Pennsylvania Public Utility Comm'n*, 361 U.S. 11

2323 and 2348, as recognized by this Court in *United States v. Providence Journal Co.*, 56 U.S.L.W. 4366, 4370 n.9 (U.S. May 2, 1988), citing Stern, "Inconsistency" in Government Litigation, 64 Harv. L. Rev. 759 (1951).

[2] The ICC is the proper forum for interpreting Federal motor carrier licenses, *Nelson, Inc. v. United States*, 355 U.S. 554, 558 (1958), and may do so through declaratory orders. See *Service Storage & Transfer Co. v. Virginia*, 359 U.S. 171 (1959).

(1959) (summarily reversing a State court judgment on the basis of the *Service Storage* principle).

2. This litigation stems from an ICC proceeding (begun in March 1985) in which a motor carrier (and one of its shippers) sought a declaratory order that its ICC license authorizes it to conduct certain operations within Texas as part of interstate transportation. The State of Texas intervened as an opposing party before the ICC.

Despite the pendency of the ICC proceeding, in October 1985 Texas instituted an enforcement action against the carrier and shipper in Texas State court.[3] In that action Texas claims that the same operations constitute unlawful *intra*state transportation.

In April 1986 (and again in August 1987), the ICC declared that the operations at issue are part of *inter*state transportation authorized by an ICC certificate.[4] Pursuant to the Administrative Orders Review Act (28 U.S.C. 2341, *et seq.*) (also known as the Hobbs Act), Texas filed a timely petition for review of the ICC's determination in the court below (U.S.C.A. 5th Cir., 87-4725).[5]

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[3] *The State of Texas v. E&B Carpet Mills, a Division of Armstrong World Industries, Inc., and Reeves Transportation Company of Georgia,* No. 386,524 (353d Texas Judicial District).

[4] *Armstrong World Industries, Inc.–Transportation Within Texas–Petition for Declaratory Order,* 2 I.C.C.2d 63 (1986) (App. E, 12a-31a, *infra*), *aff'd on administrative appeal,* not printed (served August 25, 1987) (App. F, 32a-47a, *infra*).

[5] Briefing in the case was completed in May 1988, but oral argument has not yet been scheduled. Texas has filed a motion in the case seeking consolidation with, or argument at the same time as, *State of Texas v. Interstate Commerce Comission,* No. 88-1223 (U.S.C.A., 5th Cir.) (appealing a partial denial of a Freedom of Information Act request), a case in which no briefing schedule has yet been set.

Shortly thereafter, in November 1987, the ICC sought a preliminary injunction in the Hobbs Act case against further State prosecution. We asked the court to issue the injunction pursuant to the All Writs Act, 28 U.S.C. 1651, in aid of the court's appellate jurisdiction over the ICC case.[6] We argued, on the basis of *Service Storage, supra,* that the parallel State court action is improper and that only Federal remedies are available to Texas.[7]

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[6] The carrier and shipper have sought similar injunctive relief against the State prosecution in a complaint filed in August 1986 in United States District Court, *E&B Carpet Mills v. Mattox, et al.,* Civ. No. A-86-CA-446 (W.D. Tex.) (in which the ICC has intervened). They also sought a preliminary injunction *pendente lite.* In October 1986, the District Court denied the request for preliminary injunction. The District Court did not address the likelihood of success on the underlying *Service Storage* claim. Rather, it found that irreparable harm had not been shown. (App. G, 48a-50a, *infra.*) We believe that the District Court's decision was based on the fact that the State court proceeding was held in indefinite abeyance at the time in light of the ICC proceeding. Moreover, the District Court only addressed the potential harm to the plaintiffs' private interests; it did not focus on harm to Federal interests.

In October 1987, upon learning that the State court case had been reactivated (and set for trial to begin in early December 1987), the ICC filed its own motion for a preliminary injunction *pendente lite* in the District Court case. Despite a request for expedited consideration (by November 1987), the District Court has yet to rule on either the ICC's motion or the underlying suit. Given the ruling by the Fifth Circuit here that the State action can proceed independently, it is now doubtful that any relief from the lower court will be forthcoming or could be efficacious in the Fifth Circuit.

[7] We explained that if the State disagrees with the *factual* predicate of the ICC's decision, its recourse is to file a complaint with the ICC (or in Federal district court) demonstrating any materially different facts. The State's disagreement with the ICC's *legal* conclusion is being pursued in the Fifth Circuit case. But the State cannot elect to disregard pre-eminent Federal jurisdiction and the preemptive nature of the Commission's decision.

The court denied the motion for preliminary injunction[8] and also a petition for rehearing.[9] The court ruled that its jurisdiction to review the ICC decision would not be impinged because the State court lacks authority to review the ICC decision and cannot bind the Federal court. (App. A, 4a, *infra.*) The court further found no reason why the parallel State and Federal cases may not both proceed independently, since any conflict between the two may ultimately be resolved by this Court on certiorari.[10] (*Id.*)

In a recent development, the State court has granted summary judgment to the State and permanently enjoined the operations at issue. (App. H, 51a-53a, *infra.*)

REASONS FOR GRANTING THE PETITION

1. This case is of exceptional importance. At stake is the Federal authority vested in the Interstate Commerce Commission to interpret the licenses that it has issued and, correlatively, the Federal government's preemptive power to determine whether disputed operations may be conducted while their validity is being resolved.

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[8] *State of Texas v. United States,* 837 F.2d 184 (5th Cir. 1988) (App. A, 1a-6a, *infra*).

[9] App. B, 7a, *infra.* In addition the Fifth Circuit rejected a request for *en banc* consideration, on the ground that the full court does not consider decisions that are not dispositive of the case. (App. C, 8a, *infra.*)

[10] Indeed, the court below specifically stated that even if it had *already* affirmed the ICC's decision (meaning that the transportation is interstate and thus beyond the State's authority to regulate), it would not be compelled to enjoin the State prosecution. (App. A, 4a, *infra.*)

The holding of this Court in *Service Storage, supra*– that there cannot be concurrent ICC and State court litigation as to whether particular transportation is interstate or intrastate, and that such disputes must be litigated in the Federal arena–would be vitiated if the Court of Appeals decision is allowed to stand. The court below reasoned that the State court determination can ultimately be reviewed by this Court (on certiorari) "as was the case in *Service Storage* . . ." (App. A, 4a, *infra*). But if the *Service Storage* litigation must be repeated any time a State seeks to challenge operations conducted under color of a Federal certificate, there would be nothing left to this Court's holding there.

Permitting the State action to go forward, regardless of the ultimate outcome of either the Federal or State litigation, severely damages the Federal role in motor carrier licensing. It allows State prosecutors to enforce their own interpretation in contravention of clear Federal supremacy.[11] A State should not be permitted to usurp the Constitutional power of the Federal government under the Commerce Clause.[12] Accordingly, a State obstacle to the fulfillment of Congressional purpose relating to interstate commerce must be re-

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[11] U.S. Const. Art. VI, cl. 2. *McCullough v. Maryland*, 17 U.S. 316, 405-06 (1819) (State officials and State courts are bound by Federal law); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); see also *Missouri Pacific R. Co. v. Railroad Comm'n of Texas*, 653 F. Supp. 617 (W.D. Tex. 1987) (Federal courts are to guard against overly zealous State prosecutions in areas occupied by Federal law).

[12] U.S. Const. Art. I, sec. 8, cl. 3. *Northern Natural Gas Co. v. State Corporation Commission*, 372 U.S. 84, 92 (1963); *City of Chicago v. Atchison, Topeka & Santa Fe Railway*, 357 U.S. 77 (1958); *Middle South Energy v. Ark. Public Serv. Comm'n*, 772 F.2d 404, 413 (8th Cir. 1985), *cert. denied*, ___ U.S. ___, 106 S.Ct. 884 (1986).

moved.[13]

The very existence of a State enforcement action undermines the stability of the Federal regulatory program and the ability of carriers and shippers alike to rely on Federally-issued certificates.[14] Carriers and shippers should not be subjected to the uncertainty of litigation in more than one forum and the intimidation of prosecution in State courts for conducting Federally-authorized operations. Nor should the States be allowed to impede or disrupt Federally-authorized operations.

Allowing a State prosecution to proceed enables State authorities to shut down operations, whether through intimidation (by the threat of fines and penalties) or (as in this case) direct court order despite an express ICC determination that the operations are within exclusive Federal jurisdiction. Thus, it affords State officials a *de facto* veto power over the operation of Federally-licensed carriers.

In short, the damage to the Federal regulatory system is both immediate and irreparable. The potential adverse consequences extend beyond this case, affecting other carriers operating in Texas[15] and in other States.[16] The burden of defending against a State pros-

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[13] The concept of comity "is not strained when a federal court cuts off state proceedings that entrench upon the federal domain." *Middle South Energy, supra,* 772 F.2d at 417.

[14] See *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.,* 450 U.S. 311 (1981).

[15] See, *e.g. State of Texas v. The Quaker Oats Company,* No. 411,633 (98th Texas Judicial District), where the State is prosecuting another carrier and shipper for conducting an operation that the ICC has declared to be part of lawful interstate transportation.

[16] The Commission has received several recent requests to resolve disputes over whether particular transportation is in-

ecution, the uncertainty which would result from potentially differing State and Federal interpretations, and the prospect of having disputed operations shut down during the pendency of protracted litigation, will discourage carriers from conducting any Federally-licensed operations of which a State disapproves. *Service Storage, supra,* at 177-78.

2. In drawing a distinction between *agency* and *court* jurisdiction over the same case (App. A, 4a, *infra*), the court below failed to recognize that the ICC's jurisdictional grant is *shared* by the reviewing court. See 28 U.S.C. 2349. Judicial review is not a separate and independent process, but is inextricably intertwined with the administrative process. *Morgan v. United States,* 307 U.S. 183, 191 (1939). Thus, the court below should have acted to ensure that a State court action does not interfere with or usurp the Federal government's Constitutionally founded role in interstate transportation, which is executed by the ICC and is subject only to *Federal* court review.[17]

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terstate or intrastate, and thereby protect the parties involved from potential prosecutions in other States, *e.g.*, No. MC-C-10999, *Matlack, Inc.–Transportation within Missouri–Petition for Declaratory Order;* No. MC-C-30006, *The Quaker Oats Company–Transportation Within Texas and California–Petition for Declaratory Order,* or from State regulatory proceedings, No. MC-C-10917, *Funbus Systems, Inc.–Intrastate Operations–Petition for Declaratory Order* (California).

[17] It is clear that the court below has the power to halt the State prosecution, thereby ensuring that the disputed operations may be conducted while the ICC's determination (that they are Federally-authorized) is under review. See *FTC v. Dean Foods Co.,* 384 U.S. 597, 604 (1966) (All Writs Act empowers appellate courts to "maintain the *status quo* by injunction pending review of an agency's action"), quoting from *Arrow Transp. Co. v. Southern R. Co.,* 372 U.S. 658, 671 n.22 (1963); *Tampa Phosphate R. Co. v. Seaboard*

3. Interlocutory review is appropriate here because denial of the preliminary injunction "finally determine[d] claims of right separable from, and collateral to, rights asserted in the [still pending] action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." [18] *Gulfstream Aerospace Corporation v. Mayacamas Corporation,* 56 U.S.L.W. 4243, 4245 (U.S. Mar. 22, 1988), quoting from *Cohen v. Beneficial Loan Corp.,* 337 U.S. 541 (1949). Indeed, interlocutory review is imperative because otherwise the carrier is prohibited by the State court's order from utilizing its Federal license.[19]

Moreover, granting interlocutory certiorari here will conserve judicial resources (at both the State and Federal level) by avoiding unnecessary litigation and piecemeal petitions for certiorari.[20] Thus, the purpose of

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Coast Line R. Co., 418 F.2d 387 (5th Cir. 1969), *cert. denied,* 397 U.S. 910 (1970) (upholding an injunction against State court action that undercut Federal transportation regulation).

[18] The decision that there can be independent State prosecution is entirely separate from and collateral to the issue in the pending Circuit Court case (*i.e.,* whether the ICC properly interpreted its certificate), as the court below recognized (see n.10, *supra*). Review now is essential to uphold the Federal system established by the Commerce Clause of the Constitution and to secure the uniformity of decision-making envisioned by *Service Storage.* Deferring review would eviscerate the *Service Storage* principle by permitting exactly what that case disallowed – concurrent State prosecution.

[19] This result should not be tolerated. See, *Construction Laborers v. Curry,* 371 U.S. 542 (1963) (overturning State court injunction against the exercise of Federal rights within NLRB jurisdiction).

[20] The approach taken by the court below would burden this Court (particularly if followed elsewhere) by requiring action on individual petitions for certiorari (as in *Jones Motor, supra*) in each

the general policy discouraging interlocutory review[21] will be promoted by exercising this Court's oversight function now to correct a fundamental misconception of *Service Storage* and of the lower courts' responsibility to protect exclusive Federal jurisdiction. See *Amer. Const. Co. v. Jacksonville Railway,* 148 U.S. 372, 383 (1893) (purpose of requiring finality is to lighten Court's litigation burden; interlocutory certiorari is appropriate "in cases of peculiar gravity and general importance, or in order to secure uniformity of decision.").[22]

4. The error in the decision by the court below, in failing to uphold the *Service Storage* principle, is so clear-cut that it warrants summary reversal by this Court.[23] Further articulation of the case (through brief-

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instance in which a State court action proceeds in an area of Federal jurisdiction. By contrast, if the lower courts were instructed to enforce the *Service Storage* principle using their own injunctive power, there should be no need for this Court's attention to individual cases.

[21] Despite the general policy, this Court has granted interlocutory certiorari to review a preliminary injunction. *Myers v. Bethlehem Corp.*, 303 U.S. 41 (1938) (finding that a preliminary injunction was improperly issued because of a lack of jurisdiction).

[22] Enforcing *Service Storage* would secure uniformity of decisions by avoiding conflicts between State and Federal authorities. 359 U.S. at 177-78.

[23] The requirements for a preliminary injunction have clearly been met. The ICC should prevail, on the basis of *Service Storage,* on its claim that the State enforcement action cannot proceed in the face of the ICC determination that the operations are Federally authorized. As described above, there is a threat of irreparable injury to the Federal system absent an injunction (see pp. 6-8, *supra*). That threat outweighs any harm to Texas, which has other avenues of relief (see n.7, *supra*). Finally, the injunction would serve the public interest in a sound Federal regulatory system (see pp. 6-7, *supra*). See *University of Texas v. Camenisch,* 451 U.S. 390, 392

ing and oral argument) should not be necessary; the issue involved is a purely legal one that is controlled by direct and unambiguous precedent of this Court. Moreover, summary reversal is necessary to minimize the harm to the Federal program described above (at pp. 6-8,) particularly in view of the State court injunction prohibiting a Federally-licensed operation.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted and the decision of the court below denying the motion for preliminary injunction should be summarily reversed.

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MAY 1988

(1981) (acknowledging the Fifth Circuit test for the issuance of a preliminary injunction).

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 87-4725

STATE OF TEXAS, PETITIONER

v.

UNITED STATES OF AMERICA, AND
INTERSTATE COMMERCE COMMISSION, RESPONDENTS

Feb. 1, 1988

Before POLITZ, JOHNSON and HIGGINBOTHAM, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

The Interstate Commerce Commission seeks a preliminary injunction to stay certain proceedings in a Texas state court. According to the Commission, the state proceeding concerns claims identical to those pending before this court in an appeal from a declaratory ruling made by the Commission. Convinced that the state court proceeding poses no serious threat to our jurisdiction to hear the administrative appeal, we deny the motion.

I.

The State of Texas has appealed directly from an order of the ICC determining that certain truck shipments made by Reeves Transportation Company

within Texas are interstate – rather than intrastate – in nature. The consequence of this ruling is that the shipments, which Reeves made under an ICC certificate, are not subject to the rules of the Texas Railroad Commission. The main basis for the state's appeal is that the ICC lacked jurisdiction to issue a declaratory ruling as to the interstate status of a shipper. The controversy revolves around the proper interpretation of *Service Storage & Transfer Co. v. Virginia*, 359 U.S. 171, 79 S.Ct. 714, 3 L.Ed.2d 717 (1959).[1]

Reeves transported carpet made by Armstrong Mills from Arlington, Texas, to other points within the state, but did not obtain authorization from the state commission. The state considered the shipments intrastate, and began an investigation of Reeves in 1985. Because the shipments involved goods originating in Georgia, Reeves and Armstrong petitioned the ICC for a declaratory ruling that the shipments were interstate and beyond the state's regulatory authority. While the ICC proceedings were pending, the Attorney General of Texas filed an enforcement action against Reeves in Texas state court, styled *State of Texas v. E & B Carpet Mills, a division of Armstrong World Indus., and Reeves Transp. Co.*, No. 386,524, 353d Texas Judicial District. The state also intervened in the ICC proceedings, but the Commission denied Texas' motion to stay the administrative proceeding pending the outcome of the state court suit.

In 1986, after notice and hearing, the ICC ruled that the shipments were interstate and thus within the ICC's exclusive regulatory authority. On this basis, Armstrong filed a complaint in federal district court seeking

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[1] Obviously, we intimate no opinion as to merits of the administrative appeal or the state's likelihood of success.

to enjoin the state court action. *E & B Carpet Mills v. Mattox,* Civ. No. A-86-446 (W.D.Texas). As an intervening plaintiff, the ICC supported Armstrong's motion for a preliminary injunction. In October, 1986, the district court denied the injunction, finding that Armstrong had failed to prove irreparable injury because any damages sustained by Armstrong could be compensated by law. Neither Armstrong nor the ICC appealed the decision though entitled to by 28 U.S.C. § 1292(a)(1). In October, 1987, the ICC filed its own motion for a preliminary injunction asserting irreparable injury to the federal government. The district court has not ruled on the Commission's request.

Meanwhile, the ICC denied petitions to reconsider its declaratory order. The State of Texas filed this direct appeal from the administrative decision. The ICC now asks the court to enjoin the state court proceeding pending our review of the ICC's order.

II.

[1, 2] The All Writs Act, 28 U.S.C. § 1651,[2] gives this court limited authority "to preserve the court's jurisdiction or maintain the status quo by injunction pending review of an agency's action through the prescribed statutory channels." *FTC v. Dean Foods Co.,* 384 U.S. 597, 604, 86 S.Ct. 1738, 1742, 16 L.Ed.2d 802 (1966). Moreover, because a federal agency seeks the injunction, the ICC's motion is not directly precluded by the strictly enforced rule of the Anti-Injunction Act, 28 U.S.C. § 2283.[3] *See Leiter Minerals, Inc. v. United*

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[2] "[A]ll courts established by Act of Congress may issue all writs necessary and appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

[3] "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

States, 352 U.S. 220, 225-226, 77 S.Ct. 287, 290-91, 1 L.Ed.2d 267 (1957); *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 92 S.Ct. 373, 30 L.Ed.2d 328 (1971); *Tampa Phosphate R. Co. v. Seaboard Coast Line R. Co.*, 418 F.2d 387, 394 (5th Cir.1969), *cert. denied*, 397 U.S. 910, 90 S.Ct. 907, 25 L.Ed.2d 90 (1970). Nevertheless, we are guided by the overarching principle that federal courts are to be cautious about infringing on the legitimate exercise of state judicial power. *See generally Younger v. Harris*, 401 U.S. 37, 44-45, 91 S.Ct. 746, 750-51, 27 L.Ed.2d 669 (1971).

[3] It is difficult to see why an injunction is necessary to preserve our jurisdiction over the case. The state enforcement proceeding arguably involves application of the ICC's declaratory order; no doubt the order constitutes Armstrong's primary defense. But the state court does not have the power to review the ICC's order for error and the state court's interpretation obviously has no binding effect on our decision in that regard. If we had already reviewed and affirmed the ICC order, *after* which the state brought an enforcement proceeding, this court would not be compelled to enjoin the proceeding. Rather, as was the case in *Service Storage*, the state court's application of the ICC's order may be reviewed in due course by the U.S. Supreme Court.

[4] In fact, as this hypothetical demonstrates, the ICC seeks this injunction because it believes the enforcement proceeding interferes with its own jurisdiction, not ours. In other words, the ICC contends that once it has entered a declaratory order, no proceeding in which the order might constitute a defense may be brought in any state court. While such a rule might

better effectuate the ICC's decisions, it has little to do with our power to review the Commission's work.[4]

Although somewhat similar to this case, *Tampa Phosphate, supra,* does not control our decision. There a railroad brought condemnation suits to establish a right-of-way for a new line, even though the ICC had ruled both that the proposed line would be subject to federal regulation as interstate commerce and that no ICC certificate would be issued. A federal district court preliminarily enjoined the state-court condemnation suits, and we affirmed. However, unlike this case, the *Tampa Phosphate* court relied on a jurisdictional statute expressly authorizing injunctions against construction of an unauthorized railroad line. *See* 418 F.2d at 393. Here the ICC points to no authority indicating that Congress has tipped the balance in favor of federal interests. Unlike *Tampa Phosphate,* then, we have no authority to

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[4] In this regard we also note that second of the three exceptions in the Anti-Injunction Act contains the same language as the All Writs Act, insofar as it permits a federal court to issue an injunction "where necessary in aid of its jurisdiction." In cases decided under this exception, courts have interpreted the language narrowly, finding a threat to the court's jurisdiction only where a state proceeding threatens to dispose of property that forms the basis for federal in rem jurisdiction, *see, e.g., Signal Properties, Inc. v. Farha,* 482 F.2d 1136, 1140 (5th Cir.1973), or where the state proceeding threatens the continuing superintendence by a federal court, such as in a school desegregation case. *See* Wright & Miller § 4225. In no event may the "aid of jurisdiction" exception be invoked merely because of the prospect that a concurrent state proceeding might result in a judgment inconsistent with the federal court's decision. *See Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers,* 398 U.S. 281, 295-96, 90 S.Ct. 1739, 1747-48, 26 L.Ed.2d 234 (1970).

issue an injunction beyond that necessary to protect our own jurisdiction. Because our jurisdiction is not threatened here, the Interstate Commerce Commission's motion for a preliminary injunction is DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-4725

STATE OF TEXAS, PETITIONER

versus

UNITED STATES OF AMERICA, AND
INTERSTATE COMMERCE COMMISSION, RESPONDENTS

PETITION FOR REVIEW OF AN ORDER OF THE
INTERSTATE COMMERCE COMMISSION
(Texas Case)

[Filed Mar. 8, 1988]

Before POLITZ, JOHNSON and HIGGINBOTHAM, Circuit Judges.

BY THE COURT:

IT IS ORDERED that respondents' motion for reconsideration of the Court's order of February 1, 1988, is DENIED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

February 17, 1988

Mr. Michael L. Martin, Attorney
Interstate Commerce Commission
12th & Constitution Ave., NW, Rm. 5211
Washington, DC 20423

No. 87-4725 – State of Texas vs. USA & ICC

Dear Counsel:

Please be advised that your petition for rehearing of the Court's order of February 1, 1988, was received, filed and distributed to the panel for disposition.

We have been authorized to return herewith, unfiled, the suggestion for rehearing en banc of that order with the advice that the Court will not consider petitions for rehearing en banc of non-dispositive orders.

We will notify you immediately upon release of the Court's decision on the petition for panel rehearing.

Very truly yours,

Gilbert F. Ganuchaeu, Clerk

/s/ RICHARD E. WINDHORST, JR.
Richard E. Windhorst, Jr.
Chief Deputy Clerk

REW/ja

cc: All Counsel of Record

APPENDIX D

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, United States Constitution, provides that:

Section 8. [1] The Congress shall have Power To

* * *

[3] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . .

Article VI, United States Constitution, provides that:

[2] This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or laws of any State to the Contrary notwithstanding.

The All Writs Act, Title 28, United States Code, Section 1651, provides that:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

* * *

The Administrative Orders Review Act, Title 28 United States Code, Section 2342, provides that:

> The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of–
>
> * * *
>
> (5) all rules, regulations, or final orders of the Interstate Commerce Commission made reviewable by section 2321 of this title and all final orders of such Commission made reviewable under section 11901(j)(2) of title 49, United States Code.

The Administrative Orders Review Act, Title 28 United States Code, Section 2349, provides that:

> (a) The court of appeals has jurisdiction of the proceeding on the filing and service of a petition to review.
>
> * * *

The Interstate Commerce Act, Title 49 United States Code, Section 10521, provides that:

> (a) Subject to this chapter and other law, the Interstate Commerce Commission has jurisdiction over transportation by motor carrier and the procurement of that transportation . . . to the extent that passengers, property, or both, are transported by motor carrier–
>
> (1) between a place in–
>
> (A) a State and a place in another State;
>
> * * *
>
> (b) This subtitle does not–

> (1) except as provided in sections 10922(c)(2), 10935, and 11501(e) of this title, affect the power of a State to regulate intrastate transportation provided by a motor carrier . . .

The Interstate Commerce Act, Title 49 United States Code, Section 10921, provides that:

> Except as provided in this subchapter or another law, a person may provide transportation or service subject to the jurisdiction of the Interstate Commerce Commission under subchapter II, III, or IV of chapter 105 of this title or be a broker for transportation subject to the jurisdiction of the Commission under subchapter II of that chapter, only if the person holds the appropriate certificate, permit, or license issued under this subchapter authorizing the transportation or service.

APPENDIX E

No. MC-C-10963

ARMSTRONG WORLD INDUSTRIES, INC. – TRANSPORTATION WITHIN TEXAS – PETITION FOR DECLARATORY ORDER

Decided April 3, 1986

DECISION

BY THE COMMISSION:

Armstrong World Industries, Inc. (Armstrong or petitioner) filed a petition for a declaratory order to determine whether certain transportation within Texas is interstate or intrastate in nature. Reeves Transportation Company of Georgia (Reeves) joined in the request. By a decision served July 10, 1985, we granted the petition and instituted this proceeding. Notice of the proceeding was published in the Federal Register [50 F.R. 28296 (July 11, 1985)]. The notice invited comments from interested parties, and 15 parties submitted written comments.[1] In addition, Armstrong and Reeves submitted replies to the comments. We conclude that the involved movements are performed in interstate commerce.

[1] Armstrong, Reeves, the State of Texas, the Railroad Commission of Texas, the Alabama Public Service Commission, the Texas Industrial Traffic League Division, Red Arrow Freight Lines, Inc., William J. Monheim, Walton Transportation Company, Overnite Transportation Company, Burnham Service Company, Inc., Central Freight Lines Inc., Cantrell Motor Lines Inc., Consolidated Motor Express, Inc., and Hartley Trucking Company, Inc.

PRELIMINARY MATTERS

Red Arrow Freight Lines, Inc., and Central Freight Lines Inc. request that this proceeding be set for oral hearing. The requests will be denied. The written record is complete and fully explores all the issues. It contains all the facts necessary to reach an informed decision, and material facts are not disputed.

The State of Texas (State) moves that this proceeding be stayed pending the outcome of a suit brought in a Texas State court by the State on this very same issue. The case is docketed as *State of Texas* v. *E & B Carpet Mills, a Division of Armstrong World Industries, Inc., and Reeves Transportation Company of Georgia,* No. 386524 (Travis County Texas Dist. Ct., filed October 3, 1985).[2] The State argues that the facts before us are not clear and uncontroverted, as alleged by petitioner, and that the State court is uniquely qualified to develop the record. The State requests a stay in the interest of comity, to avoid possible conflicting decisions in an area of State regulation, and in the interest of judicial economy. Petitioner and Reeves have replied in opposition to this motion.

The State's motion for a stay will be denied. The threshold question here and in the State proceeding is whether the transportation at issue is being lawfully performed under Reeves' interstate operating rights. The Supreme Court has twice held that the interpretation of this Commission's certificates is a matter for this agency in the first instance. *Service Storage & Transfer Co.* v. *Virginia,* 359 U.S. 171 (1959); *Jones Motor Co.,*

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[2] The State seeks over $22,000 in fines plus attorneys' fees, court costs, and investigation costs from E&B and Reeves. It also seeks to enjoin Reeves from transporting the involved traffic until it obtains Texas intrastate operating authority.

Inc. v. *Pennsylvania Public Utility Comm'n*, 361 U.S. 11 (1959). Other Federal courts have since held the same.[3] Moreover, as noted above, we find the record in this proceeding is complete and ripe for decision.

The Railroad Commission of Texas (Railroad Commission) requests leave to file "rebuttal comments" to the comments of Armstrong and Reeves. It states that its initially filed comments were based on the limited facts provided by the Federal Register notice. We will accept these additional pleadings and consider them. While the notice specifically referred interested persons to our full decision for additional details, the subsequent comments of Armstrong and Reeves did significantly expand on the incidents of the transportation at issue. The Railroad Commission has a significant interest in the outcome of this proceeding, and it should be given the opportunity to state fully its position.

ISSUE

All parties agree that the issue presented here is whether the movements of non-sidemarked[4] carpet from Arlington to other Texas points are interstate or intrastate in nature. The case law is clear, and the parties concede, that movement beyond Arlington of *sidemarked* carpet is in interstate commerce. See, *e.g.*, *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564, 567-68

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[3] *See, e.g., George Transfer & Rigging Co., Inc.* v. *United States*, 380 F. Supp. 179 (D.Md. 1974) (3-judge court), affirmed *mem.* 419 U.S. 1042 (1974); *Contractors Cargo Co.* v. *United States*, 229 F. Supp. 287 (C.D.Cal. 1969) (3-judge court), affirmed *mem.* 397 U.S. 39 (1970). *Merchants Fast Motor Lines, Inc.* v. *ICC*, 528 F.2d 1042 (5th Cir. 1976).

[4] Sidemarking designates the customer to whom the carpet will eventually be shipped and is indicated on the roll of carpet by a tag and also on the freight documents.

(1943); and *Country Maid, Inc.* v. *Haseotes,* 324 F.Supp. 875, 877 (E.D.Pa. 1971) ("When goods are sent to a storage point to fill the special order of a customer, they remain in the flow of commerce until they reach that customer.")

BACKGROUND

E&B Carpet Mills (E&B), a division of Armstrong World Industries, manufactures carpet at Dalton, GA, and Winchester, TN. It transports the Winchester carpet to Dalton for storage and future distribution. E&B also operates a service center at Arlington, TX. It ships carpet from Dalton to Arlington, temporarily stores it there, and then reships it to retail outlet customers located primarily in Texas. Less than 10 percent of this carpet moves from Arlington to points in neighboring States. In 1984, E&B had gross sales of $135 million. Approximately three percent of these sales involved carpet shipped from Dalton to Arlington, followed by movement to other Texas points.

E&B established its Arlington service center in 1969 to have E&B personnel nearby to provide a faster and more flexible service to Texas customers, and to enable it to take advantage of lower truckload rates from Dalton to Arlington in lieu of higher less-than-truckload rates from Dalton directly to individual Texas customers. In 1984, approximately 850,000 square yards of carpet moved through the service center. On average, the service center has in stock about a 2-month inventory.

Generally, almost all carpet at the service center is stored without segregation, except that carpet that has already been designated for a particular customer is stored separately. About 40 percent of the carpet

handled at the center is cut, at customer request, prior to delivery. The rest is reshipped in exactly the same form in which it arrives.

Approximately 31 percent of the carpet coming into Arlington is designated for a particular customer. E&B sidemarks these rolls upon leaving Dalton. Sidemarked shipments generally leave Arlington within 48 hours. The remaining 69 percent of the carpet shipped from Dalton remains at Arlington an average of 2 to 3 months. This carpet, delivered to Arlington without an underlying customer order, generally moves from Dalton on the basis of sales trends and the buying history of E&B's major customers, which account for about 80 percent of its overall sales.

The Arlington service center currently handles about 35 percent of the carpet that E&B sells to customers in Texas, and formerly handled about twice this amount. Because of this decline in volume, Armstrong has sought to improve the center's business. Under E&B's prepaid freight program instituted in June 1984, E&B pays the freight charges on customer purchases moving through the service center rather than shipping the freight collect. This allows E&B to quote delivered prices to its customers, who then know as soon as possible the amount owed and only have to make one payment for the shipment.

The prepaid freight program used Reeves' services because E&B found that local intrastate rates were very high and that Reeves offered interstate rates that were much more competitive. According to one study made by E&B, Reeves' rates were, on average, 38 percent lower than the otherwise applicable intrastate rates.

Reeves holds nationwide general commodity authority and specializes in serving the carpet industry. Reeves

does not hold any Texas intrastate operating authority, although it has recently applied for such authority in the event that the movements at issue are found to be intrastate in nature. E&B's shipments through the service center to Texas customers move under a storage-in-transit provision contained in Reeves' tariff ICC REEV 225, at Item 910. This item allows shipments from Dalton to stop in transit for storage, the effect of which is to treat the inbound carpet shipments from Dalton to Arlington and the out-bound shipments from Arlington to other Texas points as one continuous interstate movement.

To take advantage of this provision, E&B must, at the time of the initial shipment from Dalton, note on the bill of lading and shipping order that the shipment is to be stored in transit. E&B's personnel at Dalton have been instructed to designate all shipments to Arlington for storage-in-transit. Reeves' transit item further requires that the subsequent bill of lading and shipping order for outbound shipments from the service center contain a reference to the freight bill number, bill of lading number, or the manifest number from the original inbound movement. These requirements ensure that each shipment from the service center has had a prior interstate movement. The storage-in-transit provision further requires reshipment from the storage point within 12 months of the carpet's being placed in storage. Reeves uses this storage-in-transit provision in conjunction with aggregate tender and volume discount provisions it maintains in other tariffs.

E&B frequently uses one carrier to transport the carpet from Dalton to Arlington, and then Reeves to deliver it from the service center to the ultimate destination. Sometimes, Reeves performs both movements. Armstrong states that, while Reeves has been

very active in moving E&B's carpet from Arlington to other Texas points, it does not have the capacity to handle it all. The majority of this traffic still moves by other carriers under intrastate rates. For example, between May and July 1985, Reeves hauled approximately 14 percent of E&B's traffic moving from Arlington to other Texas points (except points in the Dallas-Ft. Worth commercial zone).[5] E&B states that it has been unable to find other interstate carriers willing to offer a service similar to that of Reeves that makes use of lower, interstate rates.

COMMENTS

Armstrong states that its fixed and persisting intent is that all shipments moving through the Arlington service center are in interstate commerce. From the moment the carpet leaves Dalton for Arlington, there is no doubt that its ultimate destination will be either a customer in Texas or in a neighboring State. E&B manufactures many different grades and qualities of carpet that are not interchangeable. Armstrong argues that the non-fungibility of this carpet, and E&B's ability to locate and describe any given roll of carpet at the service center, support its position that the service center is merely an extension of E&B's interstate commercial activities established for the convenience of its Texas customers.

Armstrong states that the reason it has been unable to expand its prepaid freight program beyond Reeves is

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[5] Traffic in the Dallas-Ft. Worth commercial zone is handled by local carriers. It is E&B's position that, this traffic too moves in interstate commerce, but that it is exempt from the Commission's economic regulation under 49 U.S.C. 10526(b) because Arlington lies within the Dallas-Ft. Worth commercial zone.

the regulatory policy of the Railroad Commission. Armstrong claims that, for years, the Railroad Commission has vigorously monitored transportation activities within Texas, and through innumerable enforcement proceedings, levying of fines, and a constant program of investigating carriers' records, the Railroad Commission has created an intimidating climate in the Texas transportation industry. As a result, Armstrong states that most carriers are unwilling to consider the merits of its position that its shipments from Arlington are part of a continuing interstate movement. Petitioner claims that the Railroad Commission's regulatory policies deter interstate carriers from implementing innovative transportation services that might compete with Texas intrastate carriers. Intrastate carriers have been protected from competition, and have been able to maintain artificially high rates. These extra costs, Armstrong points out, are ultimately borne by the consumer.

Armstrong states that continued operations at the service center are contingent upon its obtaining a favorable decision in this proceeding. Otherwise, E&B will be forced to open a service center in Arkansas or Oklahoma to serve its Texas customers. Besides the fact that the resultant service would not be nearly as responsive or competitive, Armstrong finds it ludicrous that it should be forced to serve Texas customers from outside the State to avoid oppressive intrastate regulation. This whole matter, Armstrong believes, constitutes an undue burden on interstate commerce.

Finally, Armstrong proposes that, in addition to resolving the instant controversy, we adopt a "safe harbor" test to end the confusion in this area. Armstrong argues that the existing boundary between interstate and intrastate commerce is too vague to be applied confidently by shippers and carriers to the myriad shipping

situations that arise daily. In addition, misapplication of the existing guidelines often results in unnecessary litigation costs and fines. To end this uncertainty and expense, Armstrong proposes the following test to redefine and clarify the boundary between interstate and intrastate shipments of non-fungible commodities moving between points in the same State following a movement from outside the State:

> A movement within a State of identifiable, non-fungible goods which were delivered in the State from a point in another State or in a foreign country within the preceding 365 days, and which have been stored in the State, shall be considered a movement in interstate or foreign commerce so long as there has not been a substantial change in the character, value and utility of the goods while in the State.

The elements of this test allegedly are derived from cited case law.

The Texas Industrial Traffic League Division, Walton Transportation Company, Burnham Service Company, Inc., Cantrell Motor Lines, Inc., Consolidated Motor Express, Inc., and Hartley Trucking Company, Inc., support Armstrong's position.

Reeves' position is that the involved movements are interstate in character, and that it performs them for E&B pursuant to a lawful transit tariff provision on file with this Commission. It notes that it has similar arrangements with other shippers, but that some have discontinued these arrangements out of fear of being held liable for unlawful intrastate transportation.

The Railroad Commission argues that the critical factor in issues of this sort is whether the ultimate destination of the shipment is known at the time the shipment

leaves the origin point. If the ultimate destination is not known at this time, then once the shipment comes to rest at a storage, gathering, or processing point it ceases to be in interstate commerce. Any subsequent movement of this shipment from this point to a point in the same State is then intrastate in nature, and any person transporting it needs authority from the State. For these reasons, the Railroad Commission concludes that the movements at issue are intrastate in nature and, therefore, regulated by the State. The Alabama Public Service Commission echoes the position of the Railroad Commission. It adds that a shipper's intention that the transportation be interstate in nature is wholly irrelevant because the shipper's intention will usually be to obtain the lower freight rate.

Red Arrow, a carrier whose Texas intrastate revenues account for approximately 75 percent of its total revenues, expresses similar views to the effect that the continuity of transportation from Dalton is broken at Arlington if the ultimate destination of the shipment is not known at the time the shipment leaves Dalton. The State and Central Freight Lines Inc. also support this position. William J. Monheim, a registered practitioner, asserts that the subject traffic is intrastate in nature. Overnite Transportation Company believes that additional information is necessary to make a determination.

DISCUSSION AND CONCLUSIONS

An analysis of the facts presented, and relevant case law, leads us to conclude that the movements by Reeves of non-sidemarked carpet between Arlington and other Texas points are interstate in nature.

It is well settled that characterization of transportation between two points in a State as interstate or intra-

state in nature depends on the "essential character" of the shipment. *Texas & N.O.R.R.* v. *Sabine Tram Co.*, 227 U.S. 111, 122 (1913). Crucial to a determination of the essential character of a shipment is the shipper's fixed and persisting intent at the time of shipment. *Baltimore & O.S.W.R.R. Co.* v. *Settle*, 260 U.S. 166 (1922). This intent is ascertained from all the facts and circumstances surrounding the transportation. For example, the presence of common incidents of through carriage such as through billing, uninterrupted movement, continuous possession by the carrier, or unbroken bulk may indicate a through interstate movemement. However, the presence of these elements is not a prerequisite to a finding of such a movement. The existence of a transit privilege under which the traffic moves, though not dispositive of the issue, is a strong indication of the through character of a movement, and it diminishes the significance of the above factors. As the Court noted in *Settle*:

> These are common incidents of a through shipment; and when the intention with which a shipment was made is in issue, the presence, or absence, of one or all of these incidents may be important evidence bearing upon that question. But where it is admitted the shipment made to the ultimate destination had at all times been intended, these incidents are without legal significance as bearing on the character of the traffic. For instance, in many cases involving transit or reconsignment privileges in blanket territory, most or all of these incidents are absent, and yet the through interstate tariffs apply. [citation omitted] 260 U.S. at 171.

As particularly pertinent here, the Court also observed that shipments from a distribution point following an in-

terstate movement are often deemed a separate intrastate movement if the applicable tariffs do not confer reconsignment or transit privileges. 260 U.S. at 173.

Parties that support a finding that the subject transportation is intrastate in nature ignore the significance of the transit arrangement in determining the character of commerce within a single State. Consequently, their reliance on *Atlantic Coast Line R.R. Co.* v. *Standard Oil of Kentucky*, 275 U.S. 257 (1927), and its progeny is misplaced because no transit arrangements were involved. The Commission and the courts have made this distinction clear. For example, in *Surles Contract Carrier Application*, 4 M.C.C. 488 (1938), the Commission found that motor carrier movements wholly within Texas from a shipper's warehouse to the shipper's retail stores were not subject to the Commission's jurisdiction notwithstanding that prior to storage the freight had moved from out-of-State points in regulated carriage. The Commission concluded that the mere intent to distribute merchandise at some future time does not establish the essential continuity of movement between the original shipment from out of State and the instate distribution from the warehouse. However, the Commission was very specific in pointing out that, unlike the siutation here, "[t]here were and are no joint rates, no provisions for storage in transit, or any other arrangements between the carriers for a continuous shipment from origin points to any place beyond the point of [initial] delivery. * * * " 4 M.C.C. at 494.

Lending further support to our conclusion that the involved Texas movements are interstate in nature is *Commercial Oil Transport Extension–Jacksonville, Ill.*, 73 M.C.C. 527 (1957). That case involved movements to and from a shipper's plants in Illinois under various transit arrangements. One movement was iden-

tical to that involved here, *i.e.*, traffic moved from oiut of State to the shipper's plants in Illinois, where, after processing, the commodities moved to other points in Illinois. The Commission concluded that the latter movements were in interstate commerce. The existence of appropriate transit arrangements was deemed sufficient to convert these otherwise separate movements into a through interstate movement. 71 M.C.C. at 532. The same conclusion under similar circumstances was reached in *Commercial Oil Transport Extension–Oils,* 76 M.C.C. 773, 777 (1958).

It has long been recognized that regulated carriers may provide storage of shipments in connection with their transportation service. Furthermore, a transit privilege afforded by an appropriate tariff provision may have the effect of converting what otherwise would be an intrastate movement into interstate transportation by tying together separate transportation services into a single, through interstate movement. *Oilfield Equipment To and Between the Southwest,* 300 I.C.C. 409, 428 (1957). Though some transit arrangements are not free from doubt on the question of continuity of movement, the Commission noted in *Oilfield Equipment, supra,* the tendency is to broaden rather than to narrow the scope of transportation in interstate commerce. These decisions by no means exhaust the subject, but simply serve to illustrate the importance of transit arrangements in determining the essential character of the commerce.

A case bearing directly on the non-sidemarked nature of the carpet at issue is *Railroad Comm. of Texas* v. *Oil Field Haulers Assn.,* 325 I.C.C. 697 (1965). In it, the Commission examined whether pipe, transported from out-of-State origins to motor carrier storage-in-transit yards in Texas, was in interstate commerce when such

pipe was subsequently moved from the storage yards to an ultimate destination also in Texas. At the time the pipe was placed in storage, the ultimate consignee and destination were unknown. The transportation and storage were performed pursuant to storage-in-transit tariff provisions maintained by the carriers. The storage yards were maintained by the carriers and shipments therefrom were transported to ultimate destinations upon instruction from the shipper or consignee.

Concluding that the movements of pipe from the storage yards to other Texas destinations were in interstate commerce, the Commission found critical the fact that:

> * * * this pipe is transported by defendants pursuant to the terms of the storage-in-transit arrangement provided in the tariff duly filed with this Commission. * * *
>
> The record clearly indicates that all the pipe does in fact move beyond the transit point, and that it is in the intent of the shipper that the movement from origin to ultimate destination constitutes one continuous movement. *Merely because the exact identity of a particular consumer is unknown is of no moment.* As has often been stated, transit rests upon a fiction that the incoming and outgoing transportation services, which are in fact distinct, constitute a continuous shipment of the identical article from point of origin to final destination. [Emphasis added.] 325 I.C.C. at 701.

A similar conclusion was reached in *Oil County Iron or Steel, Pipe, Midwest to Okla. & Tex.*, 326 I.C.C. 511 (1966). See also *Southern Pacific Terminal Co.* v. *I.C.C.*, 219 U.S. 498, 526 (1911); *Sabine Tram Co., supra* at

118, 130; *State Corporation Commission* v. *Bartlett & Co., Grain,* 338 F. 2d 495, 497-98 (10th Cir. 1964), *cert. denied,* 380 U.S. 964 (1965). Contrary to the contention of some parties, then, subsequent movements of shipments that are not sidemarked at the time of initial movement are not *ipso facto* intrastate in nature.

The reasoning and conclusion of the *Oil Field Haulers* case are equally compelling here. The only apparent distinction between the transit arrangements in that proceeding and those here is that there the storage yards were maintained by the carriers, whereas here the storage facility is maintained by the shipper. This distinction, however, is not of controlling significance. The critical element is the shipper's intent at the time the goods are initially shipped, as strongly evidenced by use of the transit privilege. The ownership or control of the in-transit storage facility, with one exception to be discussed *infra,* has no bearing on the shipper's intent at the origin point. Indeed, in the *Oil Field Haulers* case, even though the carriers maintained the storage yards, the goods were not released for transportation until the shipper issued instructions for delivery. 325 I.C.C. at 700. In short, no matter who controls the storage facility, the shipper controls final delivery.

Nonetheless, one court has attached some significance to the ownership of the storage facility, although in a different context, and some of the parties here rely on that case to oppose Armstrong's position. In *Southern Pac. Transp. Co.* v. *I.C.C.,* 565 F. 2d 615 (9th Cir. 1977), the court set aside a Commission decision that found certain trucking operations performed within California to be interstate in nature and performed without appropriate interstate authority.[6] At

[6] *Southern Pac. Transp. Co.–Invest. of Operations,* 120 M.C.C. 236 (1974).

issue were movements from a shipper's plants to its warehouse in the same State. The goods subsequently moved from the warehouse to intrastate, interstate, or foreign destinations, but the ultimate destinations were not determined until the goods had come to rest in the warehouse. The Commission held that the movements from the plants to the warehouse, although wholly within California, were in interstate commerce. The existence of storage-in-transit privileges was found to provide a "strong indication" of an intent of continuous interstate transportation from the plant origins to ultimate interstate destinations. 120 M.C.C. at 246-47.

The court disagreed, finding that the shipper's intent as to final destination could not be formed until the goods had come to rest in the warehouse:

> Inasmuch as the goods remained under [the shipper's] control at the Stockton warehouse and were not committed to a common carrier for an interstate or foreign movement until they left that warehouse, the requisite intent which governs the character of movement was not formed until shipment from Stockton. 565 F. 2d at 618.

The court rejected the contention that transit privileges transformed the initial intrastate movement into an interstate movement. 565 F. 2d at 619-20. The existence of two critical circumstances precluded such a result. First, when the goods left the plants, they were not committed to an interstate movement but only committed to a warehouse in the same State. Second, following the movement between two points in the same State, the goods were still in the shipper's control at the warehouse.

The court acknowledged the effect of transit arrangements in the characterization of commerce, as enunci-

ated by the Commission in *Oil Field Haulers, supra.* However, it distinguished that case on the ground that the carriers maintained the storage yards whereas the shipper controlled the warehouse in the case before it. 565 F. 2d at 619. In drawing this distinction, the court pointed to the Commission's language at 325 I.C.C. 705-06 that emphasized the difference between transit arrangements at public or shipper warehouses and storage-in-transit that remains completely in the carrier's control at its own facility. However, what the court did not note was that the Commission emphasized this difference in the context of the lawfulness of a substitution provision of a storage-in-transit arrangement where there existed the potential to commingle intrastate with interstate freight. The concern then was that, if the shipper maintained control over the storage, it could under a substitution rule mix local freight (*i.e.*, freight from an origin to a destination in one State) with other freight moving to or from out-of-State points.

This concern does not exist here, so there is no need to place dispositive emphasis on the ownership of the storage facility. None of the carpet transported to the Arlington service center has a Texas origin. Consequently, there exists no opportunity to commingle local and interstate freight. Each and every shipment from Arlington has had a prior out-of-State movement, and under the terms of the applicable tariff it must be matched with its counterpart by bill number. This distinction is sufficient to make the *Southern Pacific* case non-controlling here.

Moreover, the court's reasoning and conclusions regarding the effect of transit arrangements must be kept in the factual perspective of that case. The court refused to use the fiction of a transit privilege to impute an interstate intent to the shipper in order to establish

unlawful interstate transportation. It held only that transit privileges would not transform an initial intrastate movement into an interstate movement where the shipper's intent was not formed until after the initial movement. 565 F.2d at 619-20. In this respect, the court's analysis was governed by its perception that injustice would be worked upon the carrier by the Commission's "retroactive imposition of its jurisdiction." 565 F. 2d at 620. In short, the court refused to permit such a result where the carrier was unable to determine whether the prior movements were interstate or intrastate in nature until after the subsequent shipments were committed to an ultimate destination. This is not the case here.

In a later decision, the Ninth Circuit confirmed that *Southern Pacific* rested upon the indeterminate intent of the shipper at the time of the initial (intrastate) segment of what was in most – but not all – instances likely to be an interstate shipment. *Burlington Northern Inc.* v. *Weyerhauser Co.*, 719 F. 2d 304, 308-09 (9th Cir. 1983). (A mere "expectation" that most of the goods would eventually move interstate was not sufficient to constitute a "fixed and persisting intent" in *Southern Pacific.* 565 F. 2d at 618.) This reading of *Southern Pacific* has been confirmed by still another court, which observed that the transit privileges in *Southern Pacific* were merely "insufficient" to overcome the lack of evidence of the requisite intent on the part of the shipper. *Northwest Terminal Elevator Ass'n* v. *Minnesota PUC,* 576 F. Supp. 22, 30 (D. Minn. 1983). Hence, *Southern Pacific* cannot control here where the shipper (Armstrong) intends to and does in fact ship all of the carpet interstate from Georgia into Texas. Instead, the requisite intent required under *Settle* and *Sabine Tram, supra,* is evident, See, *e.g., State of Texas* v. *Anderson*

Clayton & Co., 92 F. 2d 104 (5th Cir. 1937), *cert. denied*, 302 U.S. 747 (1937); *Rush-Common Carrier Application*, 17 M.C.C. 661, 677-78 (1939); *Agricultural Services Ass'n–Investigation*, 131 M.C.C. 1, 13 (1978); *Exception to Interstate Application of Rates on Logs*, 364 I.C.C. 68, 70 (1980).

In sum, then, we find the transportation of non-sidemarked carpet by Reeves within Texas under its transit-in-storage provision part of a continuous interstate movement. E&B's intent that the carpet move to interstate destinations is clearly formed at the time the carpet leaves Dalton. It is unimportant that the ultimate destination and consignee of each particular shipment is not known at that time. It is the transit arrangement under which the carpet moves that joins the two movements as one, not the identity of the consignee. Nor does it matter that separate bills of lading are issued for the prior and subsequent movements of the carpet, or that the carpet comes back into the shipper's possession at Arlington. Nor does cutting the carpet at the service center alter the character of the commerce. The carpet moving from the service center is the identical carpet moving to it from out-of-State. At no time has it been processed or commingled in any way to cause it to lose the identity it had when it left Dalton. As the Supreme Court stated in *Settle, supra*, "neither through billing, uninterrupted movement, continuous possession by the carrier, nor unbroken bulk is an essential of a through interstate shipment." 260 U.S. at 171. Accordingly, we conclude that the incidents surrounding the involved transportation clearly establish that the movements of non-sidemarked carpet within Texas by Reeves are part of continuous interstate movements, lawfully performed under a storage-in-transit provision contained in an appropriate tariff.

Finally, we decline to adopt the "safe harbor" test proposed by Armstrong for making future determinations. It is generally within our discretion whether to proceed via individual adjudication or to adopt general rules. *SEC* v. *Chenery*, 332 U.S. 194, 203 (1947); *National Small Shipments Traffic Conference* v. *ICC*, 725 F. 2d 1442, 1447 (D.C.Cir. 1984). Here we believe it more desirable to examine the particular circumstances presented in individual factual settings through adjudication, as in the past, than to attempt to formulate an all-encompassing rule. Moreover, few controversies like this have been brought before the Commission in recent years. Additionally, our resolution of the instant case not only ends the controversy among the three principles involved here, Armstrong, Reeves, and the State, but it also should serve as a guide to other persons in similar situations.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The requests for oral hearing are denied.
2. The motion of the State of Texas to stay this proceeding is denied.
3. The Railroad Commission is granted leave to file additional comments, and the comments are accepted into the record.
4. This proceeding is discontinued.

By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners Sterrett, Andre, and Lamboley.

APPENDIX F

INTERSTATE COMMERCE COMMISSION

DECISION

No. MC-C-10963

ARMSTRONG WORLD INDUSTRIES, INC., – TRANSPORTATION WITHIN TEXAS – PETITION FOR DECLARATORY ORDER

Decided: August 14, 1987

Our earlier decision in this proceeding was served April 23, 1986. In that decision, we found that certain movements of carpet from Georgia to Texas were interstate in character. Central Freight Lines, Inc. (Central), Red Arrow Freight Lines, Inc. (Red Arrow), the Alabama Public Service Commission (Alabama), and the State of Texas (Texas) (collectively all referred to as petitioners), have filed petitions to reopen. Armstrong World Industries, Inc. (Armstrong) and Reeves Transportation Company of Georgia (Reeves) replied. In addition, the United States Department of Transportation (DOT) filed a reply to the petitions to reopen of Central and Red Arrow, and Southwire Company (Southwire) filed comments in support of our earlier decision. Petitioners subsequently filed a joint supplement to their petitions to reopen.

PROCEDURAL MATTERS

1. *Intervention.* Petitions to intervene were filed by the Regular Common Carrier Conference (RCCC), National Motor Freight Traffic Association (NMFTA), National Industrial Transportatioin League (NIT League), National-American Wholesale Grocers' Association, and jointly by National Small Shipments Traffic Conference, Inc., and Drug and Toilet Preparation Traffic Conference, Inc. Each petition includes comments addressing the merits of our prior decision. Neither DOT nor Southwire moved to intervene, but we will consider such motions *sua sponte.*[1] Armstrong replied to the petitions filed by NIT League, RCCC, and NMFTA.

We will grant all motions to intervene. While intervention is discretionary, we see no prejudice resulting to any party from our decision to consider all views presented at this point in the proceeding. Armstrong urges us to deny the motions to intervene filed by RCCC and NMFTA on the ground that their only purpose is to seek standing to oppose our decision in court, but this argument is unconvincing. Because decisions involving the nature of interstate versus intrastate transportation can have a significant impact upon RCCC and NMFTA members, we believe we should take their views into account in our decision. Authorizing intervention by all parties seeking it will not broaden the issues.

2. *Late filings.* Nearly all of the above petitions and replies were late, and most did not include a motion for acceptance. However, we will accept all late pleadings. No prejudice will result from this action.

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[1] DOT filed comments prior to the service of our earlier decision, but because they were late, and we were unable to consider them then, DOT was not made a party of record.

3. *Motion to strike.* Armstrong moves to strike petitioners' supplemental petition to reopen filed on August 21, 1986. This petition contains new evidence obtained by deposition of certain individuals on August 11 and 12, 1986, in connection with a civil suit brought by Texas in a Texas State court concerning the same issue involved in this case.[2] Armstrong objects to its acceptance on the grounds that petitioner failed to serve it with a copy of the depositions attached to the petition (although it was served with a copy of the petition itself) and that this constitutes an improper *ex parte* communication. Armstrong further alleges there is no justification for petitioner's failure to tender this evidence earlier.

In reply, petitioners indicate that they have submitted this new evidence at the earliest possible opportunity. They state that Armstrong thwarted their attempts to depose the involved individuals from the outset of the litigation. Only after a second court order on August 8, 1986, compelling the testimony, did Armstrong comply. Further, petitioners state that Armstrong's counsel (who filed the instant motion to strike) was himself present at all the involved depositions, that the court reporter recording the depositions has confirmed that Armstrong's counsel was sent copies of the depositions at or about the same time as were petitioners, and that, in any event, petitioners subsequently forwarded to Armstrong's counsel an additional copy of the depositions.

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[2] *State of Texas* v. *E & B Carpet Mills, a Division of Armstrong World Industries, Inc., and Reeves Transportation Company of Georgia*, No. 386524 (Travis County Texas Dist. Ct., filed Oct. 3, 1985).

By pleading filed October 13, 1986, Armstrong moves for late acceptance of a tendered reply to the substance of petitioners' supplemental petition. Armstrong states that, after receiving copies of the depositions, its reply took a long time to fashion because petitioners' allegations did not contain specific references to the several hundred pages of accompanying depositions and exhibits. Armstrong states that it was a time-consuming task to identify the sources of petitioners' allegations, to have one deposed person correct or supplement the uncorrected transcript of his deposition, and then to reply to the allegations.

Armstrong's late reply will be accepted, and its motion to strike the supplemental petition denied. The record now contains a full and balanced discussion of the new evidence.

4. *Recusal.* Texas requests that the Commission recuse itself from all further actions in this proceeding because of institutional bias and direct pecuniary interest. Texas refers to a pending Federal lawsuit brought by Armstrong's subsidiary, E & B Carpet Mills (E & B), against the Attorney General of Texas and others after issuance of our prevous decision in this proceeding.[3] Texas notes that the lawsuit was filed on August 18, 1986, the same day that this Commission mailed a motion to intervene in the action. Texas argues that this apparent collaboration between the Commission and Armstrong demonstrates an institutional bias of this agency towards Texas. It also argues that the Commission now has a pecuniary interest in the outcome of this proceeding, due to its status as a party in the Federal lawsuit, that further prejudices the State of

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[3] *E & B Carpet Mills v. Jim Mattox*, No. A-86-CA-446 (W.D. Tex., filed Aug. 18, 1986).

Texas. Texas asks that we dismiss this proceeding on the grounds that the Texas State court is the proper forum in which to resolve the issue.

Armstrong replies that Texas' motion constitutes an improper *ex parte* communications. The pleading was served on all parties to the Federal lawsuit, but it was not served on all parties to this proceeding. Armstrong asks, therefore, that we disregard it. Texas replied to this reply. It states that Armstrong's apparent collaboration with this Commission concerning the Federal lawsuit itself constitutes an improper *ex parte* communication, and requests that a hearing be conducted on this matter before an impartial panel.

Texas also submitted two letters obtained under the Freedom of Information Act that it states represent *ex parte* communications. Both are dated in October 1985. One is from Armstrong's counsel to the Commission's General Counsel requesting Commission intervention in the State court action referred to in footnote 2, *supra*, and the other is a reply from the General Counsel to Armstrong's counsel declining intervention at that point but requesting to be kept informed of further developments. Texas argues that these letters show a pattern of ongoing *ex parte* communications between the Commission and Armstrong. Armstrong argues that none of the communications that Texas questions is a prohibited *ex parte* communication under our regulations at 49 CFR 1102.2. It claims that an *ex parte* communication is only prohibited between a party and a Commission employee who participates in the decision of a proceeding, and only if that communication involves the merits of the proceeding. Armstrong argues that contact did not go beyond the General Counsel's Office, that the General Counsel was not a decisionmaker in this proceeding, and that the communications did not in-

volve the merits of this case but only the subject of possible Commission intervention in litigation to assert and protect its jurisdiction over the subject matter.

Although Texas did not serve its recusal request on all parties of record, we will consider it because it was properly served on Armstrong who, from the outset, has been primarily responsible for prosecuting the petition for the declaratory order, and because Armstrong replied to it.

We will deny Texas' request because its allegations are baseless. This Commission has only one interest in the court proceeding in which it has intervened – to protect its primary jurisdiction to decide the issue before it in this proceeding. As we stated in our prior decision (slip op. at 2), the Supreme Court has twice held that the interpretation of this Commission's certificates is a matter for this agency in the first instance. We intend to execute this responsibility in a fair and impartial manner and we reject Texas' suggestions to the contrary. The Commission does not have a pecuniary interest in the outcome of this proceeding as Texas suggests; we have not endorsed Armstrong's claim for monetary damages in the Federal lawsuit, but have joined with Armstrong only in seeking injunctive relief.

Finally, the allegations of *ex parte* communications by both Armstrong and Texas also are baseless.[4] The communications involved are not the kind prohibited by our rules. They did not address the merits of the case and do not in any way compromise our impartiality.

5. *Motion to take official notice.* Armstrong filed a motion to take official notice of two Federal appellate court decisions that arguably are relevant to jurisdic-

[4] We note that Texas continues to press these allegations by filing repetitive pleadings in letter form with numerous extraneous attachments.

tional issues raised by Texas. Texas relied in opposition. The motion will be granted, although the cases are not directly on point. Texas will not be prejudiced, as it has addressed the merits of the two cases and their relevance.

DISCUSSION AND CONCLUSIONS

The petitions to reopen, including the supplemental petitions, will be denied. There is no showing that our prior action will be affected materially because of new evidence[5] or changed circumstances, or that it involves material error.

In their initial petitions to reopen, Central, Red Arrow, Alabama, and Texas each repeat arguments previously made and fully considered and discussed by us in our prior decision. RCCC and NMFTA support petitioners' position. The other intervenors support the position of Armstrong and Reeves. RCCC and NMFTA do not offer any new arguments of their own, but simply adopt by reference petitioners' arguments. For the most part, these arguments were earlier found to be without merit and require no further discussion here. We will, however, address an alleged inconsistency in our prior decision. We will then consider the supplemental petition to reopen.

In our earlier decision, we indicated that Armstrong tags all carpet leaving Dalton, GA, for temporary stor-

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[5] Texas requests that we reopen this proceeding at least to take official notice of Reeves' tariff under which the subject traffic moves. This is unnecessary. Both the tariff itself (ICC REEV 225, Item 6400) and the storage-in-transit provision applicable to it (ICC REEV 225, Item 910) are already part of the record. They are contained in pleadings filed by Armstrong and Reeves and were sent to all parties of record, including Texas.

age in transit at Arlington, TX. We found this fact, among others, to demonstrate that Armstrong forms the requisite intent that the carpet move in interstate commerce at the time the carpet leaves Dalton. Further, we indicated that Reeves subsequently is able to handle only 14 percent of the traffic moving out of Arlington. Intrastate carriers move the other 86 percent. Central argues that, because Armstrong's intent apparently disappears on 86 percent of the traffic once it leaves Arlington, our reasoning contains a fatal inconsistency. We disagree.

The fact that some shipments do not continue movement from Arlington under the transit tariff has no bearing on the shipper's intent concerning those shipments that do continue, and it is these continuing shipments and their movement that are in issue here. At the time the carpet leaves Dalton, Armstrong clearly intends all of it to continue movement in interstate commerce from Arlington. This intent is thwarted on some traffic at Arlington due only to Reeves' lack of sufficient equipment and to Armstrong's inability to find other interstate carriers willing to participate. In any event, it is clear that Armstrong forms its intent at Dalton, the point of initial departure, and that this intent, through circumstances beyond Armstrong's control, is thwarted only later on some traffic at Arlington.

The supplemental petition to reopen offers new evidence obtained through petitioners' recent deposition of two individuals who had prepared statements for Armstrong's initial comments in this proceeding. John Pokrifcsak's statement addressed generally the incidents of the involved transportation, while Howard S. Liddic's statement attested to the accuracy of certain statistical information contained in Mr. Pokrifcsak's

statement. Petitioners assert that both depositions bring to light material inaccuracies in and contradictions to the statements submitted earlier in this proceeding. We conclude, however, that this new evidence neither materially affects our prior action nor shows that it involved material error.

Petitioners assert that were this proceeding reopened they would expect to present additional evidence regarding 20 specific points. The majority of these offers of proof, however, contain evidence that is immaterial to the central issue in this case – whether at the time the shipments leave Dalton, Armstrong had formed the requisite intent that the shipments move in interstate commerce. The offers are generally unaccompanied by argument as to their materiality. The primary thrust of petitioners' supplemental petition appears to be an attack on Mr. Pokrifcsak's reliability as a witness. Armstrong has replied to petitioners' supplemental petition, and Mr. Pokrifcsak has submitted a supplemental statement clarifying certain of his deposition responses because he did not have the opportunity to do so earlier. The reply and supplemental statement satisfactorily resolve the points raised by petitioners. We continue to find Mr. Pokrifcsak's testimony as a whole very credible, reliable, and authoritative.

Before we address specific points that arguably have material bearing on the issue here, we will identify those that do not. Petitioners argue that the new evidence obtained at deposition materially contradicts earlier statements made by Mr. Pokrifcsak. In the majority of cases, this is just not so. For instance, paragraphs 2, 8, 9, 19, and 20 do not contradict prior testimony and, in fact, do not even contain new evidence. The matters contained therein are found in

Mr. Pokrifcsak's initial verified statement and in an October 30, 1985 motion of Armstrong.

The evidence proffered in paragraphs 10 through 18 does not contradict prior evidence. These paragraphs do contain new evidence (largely involving Mr. Pokrifcsak's knowledge of specific aspects of the day-to-day operations at the Arlington service center), but this new evidence does not alter, either individually or collectively, our initial finding concerning Armstrong's intent at Dalton. New evidence in and of itself is insufficient to warrant reopening at this stage of the proceeding. New evidence is a basis for reopening only if it show material error in our prior decision. The new evidence here does not. For example, in paragraph 12 petitioners alleged that Mr. Pokrifcsak does not know how a carrier tendered a shipment at Arlington could determine if the bill of lading covering the shipment from Dalton to Arlington bore a notation that the shipment was to be stored in transit. This new evidence is immaterial for two reasons. First, Mr. Pokrifcsak's lack of knowledge on this point does not affect Armstrong's intent at Dalton that the carpet move in interstate commerce. Second, it is not the responsibility of the carrier to determine which carpet was previously marked for storage-in-transit. That is the responsibility of Armstrong's personnel at Arlington. The other evidence proffered in the paragraphs identified above similarly has no material bearing on Armstrong's intent at Dalton.

Finally, paragraph 4 contains a misstatement made by Mr. Liddic at deposition. Although Mr. Liddic promptly corrected himself, petitioners omit that portion of this statement. As corrected, Mr. Liddic's statement at deposition is not inconsistent with earlier testimony.

We now address specific points raised by petitioners that potentially have a material impact on our prior decision. In paragraph 7, petitioners argue that Mr. Pokrifcsak was not personally knowledgeable of all the statements he made earlier, as he attested, but that they represented the composite knowledge of numerous individuals at Armstrong and E & B. Petitioners argue that this reduces the credibility of the information previously supplied to us. In his supplemental statement, Mr. Pokrifcsak explains that when he stated to the Commission that the matters he asserted were within his personal knowledge, he did not mean that he personally investigated each and every detail of every matter himself. As a senior company officer directly in charge of an E & B division whose operations cover half the country, Mr. Pokrifcsak states that obviously he could not be everywhere to experience firsthand everything that occurred every day. In order to acquire the knowledge that he needed to make business decisions, Mr. Pokrifcsak states that he relied on written or oral reports made daily by people on various levels of the organization. He states that he continues to rely on this type of reporting. Armstrong argues that once Mr. Pokrifcak has analyzed and accepted this information, it is within his own personal knowledge. We agree. Additionally, that information which is based on business records comes within an exception to the hearsay rule. *See United States* v. *Mortimer*, 118 F.2d 266, 269-70 (2nd Cir. 1941). In any event, we note that petitioners do not seek to strike Mr. Pokrifcsak's earlier affidavit, but only challenge the weight to be accorded it. As we stated earlier, we continue to find it reliable.

In paragraph 5, petitioners show that, at deposition, Mr. Pokrifcsak did not recall if he first saw Item 910 of Reeves' tariff (the storage-in-transit provision) on the

date he executed his affidavit, that he was not familiar with the tariff provision, and that he did not know what the application or effect of the provision might be. In his supplemental statement, Mr. Pokrifcsak explains that these particular responses at deposition resulted from a confusing line of questioning by petitioners' attorneys. When asked if he was familiar with Item 910, he stated no because the term "Item 910" meant nothing to him at that time. He assures us, however, that he is familiar with the effect of Reeves' tariff provision and knows that it is crucial to establishing the storage-in-transit privilege. Moreover, Armstrong, argues that the specific time Mr. Pokrifcsak first saw Item 910 is immaterial as long as he was familiar with it when he made his statement. We agree.

Next, petitioners state in paragraph 6 that although Mr. Pokrifcsak swore in his affidavit that "the outbound billing documents make reference to the inbound billing documents", at deposition he was unaware of any reference on a bill of lading created at Arlington to any bill of lading, freight bill, or manifest covering shipments of the same carpet from Dalton to Arlington. Armstrong replies that petitioners mistakenly equate "billing documents" with "bills of lading", and that the two are not the same. Armstrong notes that Mr. Pokrifcsak testified at deposition that the outbound bills of lading make reference to the movement of the carpet from Dalton. In his supplemental statement, Mr. Pokrifcsak adds that the bills of lading for shipments from Arlington reference the number of the manifest covering the shipment of the roll from Dalton. In addition, Armstrong refers us to Mr. Liddic's testimony at deposition that E & B ships from Dalton to Arlington only about twice a week. Thus, Armstrong states, by referring to the date that a shipment moved to the service

center, as shown on Arlington's outbound bills of lading, one can normally identify the particular shipment from Dalton in which the carpet arrived. This method of connecting inbound and outbound shipments is supplemented by the computerized inventory tracking system maintained at the service center, as described by Mr. Pokrifcsak in his original verified statement. In conclusion, then, Armstrong states that E & B can determine which particular shipment from Dalton contained any roll of carpet that subsequently is shipped from Arlington.

In paragraph 1, petitioners show that the bills of lading attached as exhibits to the depositions that cover shipments of carpet from E & B's facility at Dalton to its Arlington service center do not reveal whether the carpet is sidemarked or non-sidemarked, contrary to Mr. Pokrifcsak's prior assertion. However, petitioners conceded that previously sidemarked carpet continued in interstate commerce from Arlington, and we concluded that the shipper's intent demonstrated that the non-sidemarked carpet continued in interstate commerce as well. Even if all the carpet were non-sidemarked when it left Dalton, it still would continue in interstate commerce from Arlington. Thus, petitioners' claim of error is immaterial. In any event, Mr. Pokrifcsak explains that sidemarking *is* shown on the freight manifest, which is very similar to the bill of lading, and that he apparently interchanged the terms. In addition, we note that Mr. Pokrifcsak also previously stated that carpet was sidemarked by tagging individual rolls.

Petitioners next state in paragraph 3 that bills of lading prepared at Dalton commencing in June 1984 were corrected in October 1985 by adding the notation "shipped to Arlington, Texas, service center for storage

in transit" or similar language, but that, on September 26, 1985, Mr. Pokrifcsak had stated that under implemented procedure, the bills of lading were marked for storage-in-transit when they left Dalton. In his supplemental statement, Mr. Pokrifcsak indicates that what he was referring to was the procedure implemented as of the date of his statement. In any event, our review of the bills of lading attached as exhibits to Mr. Liddic's deposition shows that the corrected notation appears on some but not all bills prior to September 26, 1985, and that those not corrected did originally bear the storage-in-transit notation. It appears, then, that the described procedure was applied inconsistently before September 26, 1985.

In any event, it is necessary not to lose sight of the real significance of the storage-in-transit notation. While it serves as evidence of the shipper's intent at Dalton that the traffic continue movement beyond Arlington in interstate commerce, at no time have we said that this notation is or can be the only evidence of the shipper's intent. In fact, as shown by the facts and circumstances surrounding the involved transportation, the shipper's intent could not be clearer. The stopover at Arlington is but a temporary break in one continuous interstate movement.

It is beyond the scope of this declaratory order proceeding for us to determine whether every individual shipment has moved lawfully in interstate commerce pursuant to Reeves' certificate. Our concern here is with the nature and concept of the disputed transportation as a whole and whether the certificate we have issued for interstate transportation can be properly construed to embrace that kind of service. Nothing petitioners have adduced here gives us cause to reexamine

our prior determination as to the permissible scope of the certificate that we issued.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. All late-tendered pleadings are accepted for filing.
2. Armstrong's motion to strike the supplemental petition to reopen is denied.
3. Texas's motion that the Commission recuse itself from any further consideration of this proceeding is denied.
4. Armstrong's motion to take official notice of two court cases is granted.
5. The motion to intervene are granted. The Regular Common Carrier Conference, National Motor Freight Traffic Association, National Industrial Transportation League, National-American Wholesale Grocers' Association, National Small Shipments Traffic Conference, Inc., Drug and Toilet Preparation Traffic Conference, Inc., United States Department of Transportation, and Southwire Company are made parties of record.
6. The petitions to reopen, including the supplemental petition, are denied.
7. This decision is effective on its date of service.

By the Commission, Chairman Gradison, Vice Chairman Lamboley, Commissioners Sterrett, Andre, and Simmons. Commissioner Simmons commented with a separate expression. Vice Chairman Lamboley concurred in the result.

(SEAL)

Noreta R. McGee
Secretary

COMMISSIONER SIMMONS, commenting:

Many commentators have expressed the view that in the prior decision the Commission undertook a new policy or approach in determining what constitutes interstate transportation. Presumably, this different approach represented an attack by the federal government on a State's authority to regulate intrastate transportation in light of the 1980 Motor Carrier Act. This, however, was not the case. Our prior decision rested on well-settled law. We found that the shipper made every conceivable effort to establish its intention that at the time the shipments leave Dalton, GA they were to be part of a continuous interstate movement. The shipper clearly demonstrated that intent by, among other things, complying with Reeves' storage-in-transit provision. Absent some evidence of fraud or subterfuge to evade state jurisdiction, these transit practices have long been permitted even when there was an interruption in the physical continuity of the movement at the transit point. No party has presented any new evidence to contradict the Commission's earlier conclusions.

Let me emphasize that my earlier conclusion was not based on some ideological hostility to a State's reasonable determination to regulate intrastate transportation. Nor did it rest on an intent to preempt Texas' primary jurisdiction. On the contrary, the result here would have been the same fifteen years ago.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL ACTION NO. A-86-CA-446

E & B CARPET MILLS, A DIVISION OF ARMSTRONG WORLD INDUSTRIES, INC., AND REEVES TRANSPORTATION COMPANY OF GEORGIA, PLAINTIFF

v.

JIM MATTOX, ATTORNEY GENERAL OF THE STATE OF TEXAS, NORBERTO FLORES AND DOUGLAS FRASER, ASSISTANT ATTORNEYS GENERAL OF THE STATE OF TEXAS, CENTRAL FREIGHT LINES, INC., A TEXAS CORPORATION AND RED ARROW FREIGHT LINES, INC., A TEXAS CORPORATION, DEFENDANTS

FILED Oct. 8, 1986

ORDER

In March, 1985, Plaintiffs, Reeves Transportation Company of Georgia (Reeves) and E&B Carpet Mills (E&B) sought a ruling from the Interstate Commerce Commission (ICC) whether certain trucking services performed by Reeves for E&B constituted intrastate or interstate transportation. The specific issue was whether the service from Georgia into Texas provided under Reeves' ICC certificate encompasses the storage-in-transit and subsequent movement to final delivery sites in Texas as part of interstate commerce. In April,

1986, the ICC ruled that Reeves' service is entirely interstate. Other administrative review of that decision is pending.

In October, 1985, the State of Texas filed suit against Reeves and its principal shipper E&B for injunctive relief and penalties under state law for Reeves' failure to comply with Texas' intrastate shipping regulations. The Defendant private carriers in this case, Central Freight Lines, Inc., Red Arrow Freight Lines, Inc., and Merchants Fast Motor Lines, Inc., have intervened in that suit in support of the State of Texas.

On August 18, 1986, Reeves and E&B filed this suit seeking preliminary injunctive relief against the defendants from pursuing the state court litigation and money damages for their actions against Reeves and E&B. The ICC sought to intervene in this lawsuit on August 19, 1986.

In order that a preliminary injunction may issue, the Court must be convinced that the four requirements set out in *Apple Barrell Productions, Inc. v. Beard*, 730 F.2d 384, 386 (5th Cir. 1985), *citing Dallas Cowboy Cheerleaders v. Scoreboard Posters, Inc.*, 600 F.2d 1184, 1187 (5th Cir. 1979), are met. The moving party has the burden of proving:

1. a substantial likelihood of success on the merits;
2. a substantial threat that the movant will suffer irreparable injury if the injunction is not issued;
3. that threatened injury to the movant outweighs any damage the injunction might cause to the opposition;
4. that the injunction will not disserve the public interest.

The Court, after examining the entire record, finds that the Plaintiff has failed to establish irreparable

harm at this time and that the preliminary injunction should be denied. While the harm to the Plaintiff may be difficult to prove, the Court finds that damages could be determined. Accordingly,

IT IS ORDERED that Plaintiff's Motion for a preliminary injunction be and hereby is DENIED.

IT IS FURTHER ORDERED that both sides submit briefs on or before October 17, 1986 on the following:

1. whether the Plaintiff had pleaded a proper 42 U.S.C. § 1983 claim based on the deprivation of property without due process of law, in violation of the due process clause of the fourteenth amendment;
2. whether Eleventh Amendment immunity attaches to the state defendants;
3. whether this Court should abstain under the *Younger* doctrine in light of the recent 5th Circuit case, *New Orleans Public Service, Inc. v. the City of New Orleans, et al.*,

SIGNED this 7th day of October, 1986.

/s/ WALTER S. SMITH, JR.

WALTER S. SMITH, JR.
United States District Judge

APPENDIX H

IN THE DISTRICT COURT
TRAVIS COUNTY, TEXAS
353RD JUDICIAL DISTRICT

NO. 389,524

THE STATE OF TEXAS

v.

E & B CARPET MILLS, A DIVISION OF ARMSTRONG WORLD INDUSTRIES, INC., AND REEVES TRANSPORTATION COMPANY OF GEORGIA

JUDGMENT

BE IT REMEMBERED that on the 18th day of February, 1988, came on to be heard the motions for summary judgment, including all amendments and supplements thereto, of the State of Texas, Plaintiff, Central Freight Lines and Merchants Fast Motor Lines, Inc., Intervenors, and of E & B Carpet Mills, a Division of Armstrong World Industries, Inc., Defendant, in the referenced matter. Plaintiff, Defendants and Intervenors all appeared by and through their respective attorneys of record.

The Court, having received the summary judgment evidence of the parties and the argument of counsel, and having considered the prevailing and applicable authorities, is of the opinion, and finds that:

1. The Motion for Summary Judgment of E & B Carpet Mills, a Division of Armstrong World Industries, Inc., Defendant, should be, and hereby is, OVERRULED; and

2. The Motion for Summary Judgment of The State of Texas, Plaintiff, should be, and thereby is, GRANTED.

It is, therefore, ORDERED that:

1. Reeves Transportation Company of Georgia, its officers, agents, employees and representatives should be, and are hereby PERMANENTLY ENJOINED, and ORDERED to cease and desist, instanter, from further transporting for compensation or hire, over public highways between incorporated cities within the State of Texas, carpet or floor covering commodities manufactured outside the State of Texas, and for which a specific purchaser or destination other than a point of storage has not been designated or identified at the time of its shipment from its out-of-state origin into Texas, without first obtaining the appropriate certificates or permits from the Railroad Commission of Texas authorizing such transportation; and
2. E & B Carpet Mills, a Division of Armstrong World Industries, Inc., its officers, agents, employees and representatives should be, and are hereby PERMANENTLY ENJOINED, and ORDERED to cease and desist, instanter, from aiding, abetting, hiring, procuring or compensating motor carriers to transport, over public highways between incorporated cities within the State of Texas, carpet or floor covering commodities manufactured outside the State of Texas, and for which a specific purchaser or destination other than a point of storage has not been designated or identified at

the time of its shipment from its out-of-state origin into Texas, without such motor carriers first obtaining the appropriate certificates or permits from the Railroad Commission of Texas authorizing such transportation; and

IT IS FURTHER ORDERED that Plaintiff, The State of Texas, shall have and recover of and from Defendants, E & B Carpet Mills, a Division of Armstrong World Industries, Inc., and Reeves Transportation Company of Georgia, all costs of court expended on Plaintiff's behalf in this cause, for which let execution issue.

All relief prayed for by any party but not expressly given herein is hereby DENIED.

The Clerk shall forthwith issue a writ of injunction in conformity with the law and the terms of this Order.

SIGNED this 11 day of May, 1988.

/s/ JERRY A. DELLANA
Jerry A. Dellana
Judge Presiding

U.S. GOVERNMENT PRINTING OFFICE: 1988—214 020/62025

No. 87-1938

IN THE SUPREME COURT
OF THE UNITED STATES

October Term 1987

Interstate Commerce Commission,
Petitioner

v.

State of Texas, et al.,
Respondents

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

Brief of Armstrong World Industries, Inc., and Reeves Transportation Company, Respondents Supporting Petitioner

By William P. Jackson, Jr.
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ISSUE PRESENTED

Whether Service Storage & Transfer Co. v. Virginia, 359 U.S. 171 (1959), and Jones Motor Co. v. Pennsylvania Public Utility Commission, 361 U.S. 11, petitions for rehearing and clarification denied 361 U.S. 904 (1959), required the Fifth Circuit to enjoin, in aid of its jurisdiction to review an Interstate Commerce Commission order approving certain interstate transportation, a state court proceeding brought to prevent the operations specifically approved in the agency order under review?

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No. 87-1938

IN THE SUPREME COURT
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On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

Brief of Armstrong World Industries, Inc., and Reeves Transportation Company, Respondents Supporting Petitioner

Come now Armstrong World Industries, Inc.[1] [hereinafter called Arm-

1. Armstrong has no parent company. Its subsidiaries/affiliates are as follows: Applied Color Systems, Inc.; Armstrong

(Footnote continued on next page.)

trong], and Reeves Transportation Company[2] [hereinafter called Reeves],

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Cork Company (Wilmington, Del.); Armstrong Cork Finance Corporation; Armstrong Ventures, Inc.; ArmStar (an unincorporated entity); Armstrong World Industries (Del.), Inc.; Charleswater Products, Inc.; Chemline Industries, Inc.; Forms + Surfaces, Inc.; BEGA/FS, Inc.; I.W. Investments, Inc.; Thomasville Furniture Industries, Inc.; Fayette Enterprises, Inc.; Gilliam Furniture, Inc.; Westchester Leather, Inc.; The W. W. Henry Company; ACS Applied Color Systems, G.m.b.H.; Armstrong AWI Limited; Armstrong FSC, Inc.; Armstrong (Japan) K.K.; Armstrong-Nylex Pty. Ltd.; Armstrong (Singapore) Pte. Ltd.; Armstrong World Industries Canada Ltd.; Armstrong World Industries - France, S.A.; Armstrong World Industries, G.m.b.H.; Armstrong World Industries - Isolanti S.r.l.; Euroflex S.r.l.; Armstrong World Industries Ltd.; Armstrong Cork Company (London, England); Armstrong Cork (Ireland) Limited; Armstrong Europe Services; Inarco Limited; Armstrong World Industries Pty. Ltd.; Armstrong World Industries, S.A.; Armstrong World Industries (Schweiz) A.G.; ISO Holding, A.G.; Armstrong World Industries - ACI, B.V.; Triboard Emmen, B.V.; Armstrong World Industries - Alphacoustic, S.A.; Armstrong World Industries - Europacoustic.

2. Reeves is a wholly-owned subsidiary of Preston Corporation. Preston Corporation also has other wholly-owned subsidiaries.

and submit their reply supporting the petition of the Interstate Commerce Commission [hereinafter called the ICC or the Commission] for issuance of a writ of certiorari to the United States Court of Appeals for the Fifth Circuit [hereinafter called the Fifth Circuit].

SUMMARY OF ARGUMENT

The state court's judgment in Texas v. E&B Carpet Mills, et al., No. 386,524 (Travis County, Tex., District Court May 11, 1988), effectively negates the Fifth Circuit's ability to uphold the ICC's order that is under review in Texas v. United States, No. 87-4725 (filed October 15, 1987) [hereinafter called Texas v. United States]. Enjoining the Texas state court proceeding in Texas v. E&B was

therefore necessary in aid of the Fifth Circuit's jurisdiction over Texas v. United States.

ARGUMENT[3]

This petition was filed because of a direct conflict between state and federal authorities over which can control a specific trucking operation. Only one can prevail. The principle at stake is an important one - whether a state may ignore the federal government's authorization of certain trucking operations in interstate commerce, and enjoin the conduct of those operations.

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3. Armstrong and Reeves adopt the statement of the case contained in the ICC's petition for writ of certiorari. In addition, respondents note that they filed a motion for new trial in Texas v. E&B on June 9, 1988.

I. The Transportation Approved by the ICC in the Order Under Review in Texas v. United States Has Been Enjoined By the Texas State Court

In Armstrong World Industries, Inc.- Transportation Within Texas- Petition for Declaratory Order, 2 I.C.C.2d 63 (1986), petitions to reopen denied, slip op. Aug. 25, 1987 [hereinafter called Armstrong PDO], the ICC held that Reeves' delivery of Armstrong's Georgia-produced carpet from Armstrong's Arlington, Tex., facility to other points in Texas was proper under Reeves' ICC operating authority and an ICC rate tariff filed by Reeves. The Reeves tariff permits temporary storage of Armstrong's carpet at the Arlington facility before it is delivered to Armstrong's customers. Under these circumstances, the Commission found that Reeves'

service was the final leg of a continuing interstate movement from Georgia to Armstrong's Texas customers.

The ICC's holding applied specifically to carpet that had not been designated before shipment from Dalton, Ga., for shipment to specific Armstrong customers beyond Arlington. The ICC's ruling in Armstrong PDO has been pending before the Fifth Circuit for review under 28 U.S.C. §§2321 and 2342(5) since October 15, 1987.

The Travis County, Tex., district court recently nullified the effect of the Commission's holding in Armstrong PDO. The movements at issue in Armstrong PDO were the same movements at issue in Texas v. E&B. On May 11, 1988, the state court rejected the defense by Reeves and Armstrong that the movements before the court were parts of continuing interstate move-

ments, and enjoined Reeves from conducting those movements unless the carpet was designated for a specific Armstrong customer before shipment from Dalton. In other words, the state court enjoined the very service that the ICC approved in Armstrong PDO.

II. The State Court Injunction Interferes with the Fifth Circuit's Jurisdiction by Nullifying the Court's Ability to Approve the ICC Order Under Review

The Fifth Circuit erred in holding that Texas v. E&B does not interfere with the court's jurisdiction to review the ICC's Armstrong PDO order. The Texas state court cannot directly review the ICC's order, but that is not the only test of whether the state court's action interferes with the Fifth Circuit's jurisdiction.

The Texas court's injunction directly interferes with the Fifth Circuit's jurisdiction by rendering the court's review of the Armstrong PDO meaningless. The state's injunction prevents the transportation that is at issue before both courts from being performed, even if the Fifth Circuit upholds the ICC's ruling. The Fifth Circuit's review thus becomes meaningless, except as a stepping-stone to this Court.

The effective nullification of Fifth Circuit review of Armstrong PDO caused by the state court's injunction required the Fifth Circuit to enjoin the state proceeding to protect federal jurisdiction. The state court's injunction impermissibly impinges upon the Fifth Circuit's jurisdiction by preventing a ruling upholding the ICC's order from having any practical effect. A clearer example of

interference with the court's ability to decide the case before it can hardly be conceived. An injunction against the state court proceeding was therefore necessary in aid of the Fifth Circuit's jurisdiction. See Atlantic Coast Line Railroad v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 295 (1970) [hereinafter called ACL v. BLE].

III. The Fifth Circuit Misapplied ACL v. BLE In Determining Not to Enjoin Texas v. E&B

The Fifth Circuit misapplied ACL v. BLE below. ACL v. BLE does not apply below because the state court does not have jurisdiction to decide whether Reeves' use of its ICC operating authority is proper.

The Fifth Circuit relied on ACL v. BLE below as a basis for denying the ICC's

injunction request. See Appendix A to the ICC's petition herein, p. 5a, n. 4.

ACL v. BLE involved a federal district court's refusal under federal law to enjoin union picketing connected with a rail labor dispute. The railroad being picketed then sought and obtained an injunction against the picketing in state court, under state law. Subsequently, the picketing union persuaded the federal district court that federal law required it to enjoin enforcement of the state injunction to protect its order denying the railroad's request for a federal injunction.

This Court struck down the federal court's injunction. The Court concluded that the injunction was not necessary in aid of the district court's jurisdiction and therefore fell outside the exceptions

to the Anti-Injunction Act, 28 U.S.C. §2283 (1982). The Court's ruling relied heavily on the fact that both courts involved had jurisdiction to consider the railroad's injunction requests and the union's federal law defense to those requests. See ACL v. BLE, 398 U.S. at 295.

This Court's decisions show that the Travis County court does not have jurisdiction over the federal defense asserted by Reeves and Armstrong in Texas v. E&B. In Service Storage & Transfer Co. v. Virginia, 359 U.S. 171 (1959) [hereinafter called Service Storage], this Court vacated Virginia's decision that a trucking company could not properly use its interstate operating authority for a specified operation. The loads at issue originated at and were destined to points

in Virginia, but the carrier moved them through a West Virginia terminal. The state charged the carrier with illegal intrastate transportation. The carrier defended its service as being authorized by its ICC certificate, but the Virginia authorities ruled that the carrier's use of its ICC authority was merely a subterfuge to avoid state regulation.

This Court struck down the Commonwealth's ruling. The Court held that Congress had placed exclusive initial responsibility for determining the proper scope of operations under ICC authority on the ICC. See also Jones Motor Co. v. Pennsylvania Public Utility Commission, 361 U.S. 11, petitions for rehearing and clarification denied 361 U.S. 904 (1959) [hereinafter called Jones Motor]. The Court directed the Commonwealth to present its

grievance with the carrier's use of its ICC authority to the ICC.

Service Storage and Jones Motor show that Texas state courts have no jurisdiction to rule on Reeves' and Armstrong's defense in Texas v. E&B that the service at issue is a valid exercise of ICC operating authority. Thus, ACL v. BLE did not apply below, and was wrongly found by the Fifth Circuit to prevent it from enjoining Texas v. E&B.

An injunction by this Court against enforcement of the judgment in Texas v. E&B is presently the only practical means to protect the federal rights of Reeves and Armstrong. Armstrong and Reeves tried in vain to convince the Travis County court to dismiss Texas v. E&B, or to at least hold that proceeding in abeyance

pending the outcome of Armstrong PDO and review of that decision. Likewise, Armstrong and Reeves have tried to convince both the United States District Court for the Western District of Texas and the Fifth Circuit to protect the rights declared by the ICC. All of these efforts have been fruitless. Unless this Court directs the Fifth Circuit to enjoin enforcement of the judgment in Texas v. E&B, Reeves and Armstrong will irretrievably lose their ability to exercise their lawful federal rights. Even if those rights are later restored, Reeves and E&B cannot be compensated for their loss in the interim.

CONCLUSION

WHEREFORE, the foregoing considered, Armstrong and Reeves pray that this Court grant the petition for writ of certiorari filed herein by the ICC, and further pray that the Court summarily reverse the Fifth Circuit's orders at issue here.

Respectfully submitted,

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(4)

No. 87-1938

In The Supreme Court of the United States

October Term, 1987

INTERSTATE COMMERCE COMMISSION, Petitioner,

v.

STATE OF TEXAS, ET AL., Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT [CORRECTED]

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STATEMENT OF THE CASE

This is purportedly an interlocutory appeal, taken by a federal agency *without the authorization of the Solicitor General*, from the denial of a preliminary injunction. The Fifth Circuit has already set oral argument on the very issues raised by this appeal for the week of September 5, 1988. In all likelihood, that court will have begun to write a decision on the merits before this Court rules on the instant petition. Under these circumstances alone, this petition should be denied.

However, assuming the Court wishes to further consider this matter, the State of Texas (hereinafter "Texas") submits the following statement of the case. This is done because this case presents an involved procedural history, and because Texas is extremely dissatisfied with the Interstate Commerce Commission's (hereinafter "ICC") statement of the case.

A. Statutory Framework for Federal and State Jurisdiction

Although for jurisdictional and prudential reasons this Court should not reach the merits, it is important to note at the outset the statutory framework establishing federal and state jurisdiction over motor carrier transportation. Once this framework is understood it is readily apparent that the ICC's reliance on *Service Storage & Transfer Co. v. Virginia*, 359 U.S. 171 (1959), is misplaced.

Congress has very clearly delineated the scope of the ICC's jurisdiction over transportation by a motor carrier. Under 49 U.S.C. § 10521(a)(1)(A) and (B), the

ICC has jurisdiction over motor carrier transportation that is:

> (1) between a place in -
>
> (A) A state and a place in another state;
>
> (B) A state and another place in the same state through another state;[1]

In contrast, when the commerce is on its face intrastate, Congress has, pursuant to 49 U.S.C. § 10521(b)(1), explicitly and emphatically left such regulation to the states:

> (b) This subtitle does not
>
> (1) . . . affect the power of a state to regulate intrastate transportation provided by a motor carrier.

The disputed commerce in this case takes place solely within the State of Texas and is therefore governed by 49 U.S.C. § 10521(b)(1).

B. Interplay of Proceedings Before The Interstate Commerce Commission and Judicial Trial Forums

In early 1985 the Texas Department of Public Safety initiated a motor carrier investigation of Reeves Transportation Company of Georgia (hereinafter "Reeves") pursuant to TEX. REV. CIV.

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1 *Service Storage* involved moves out of and then back into Virginia, which implicated the ICC's primary jurisdiction pursuant to this provision. See Infra at 20-22.

STAT. ANN. art. 911b (Vernon 1964 and Supp. 1988). This investigation concerned certain facially intrastate movements from the Dallas-Fort Worth area to other points in Texas. On March 25, 1985, prompted by the ongoing state investigation and *in anticipation* of a state court enforcement action, the shipper, Armstrong World Industries, Inc. (hereinafter "Armstrong"), filed a "Petition for Declaratory Order Seeking Determination of the Interstate Nature of Transportation Activities Within the State of Texas" before the ICC. The Petition sought a declaratory order, pursuant to 5 U.S.C. § 554(e), that certain commerce *within the State of Texas* was interstate in nature. The State of Texas intervened in the proceeding. No oral hearing was granted[2] and a procedure was established to allow written comments to be filed with the ICC within thirty days of the notice of the proceeding.

Thereafter, on October 3, 1985, Texas filed an enforcement action in state court pursuant to TEX. REV. CIV. STAT. ANN. art. 911b (Vernon 1964 and Supp. 1988). This action was styled *State of Texas v. E & B Carpet Mills, A Division of Armstrong World Industries, Inc. and Reeves Transportation Company of Georgia*, Cause No. 386,524 in the 353rd Judicial District Court of Travis County, Texas. Then, in light of the proceeding in state court, Texas, on or about October 4, 1985, requested in its comments filed in the ICC proceeding that the ICC defer jurisdiction to the state court action in the interest of comity.

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[2] One of the issues still pending before the Fifth Circuit in *Texas v. United States*, No. 87-4725 (hereinafter "Armstrong Petition for Review"), is whether (assuming the ICC had jurisdiction to issue the Declaratory Orders under review) an oral hearing should have been granted.

Instead, Armstrong and the ICC engaged in secret, *ex parte* correspondence concerning ways to get the case out of the state court and into a federal court.[3] In that correspondence, the ICC's General Counsel suggested to Armstrong that the ICC would intervene against Texas in a proceeding in federal court achieved by removal or by an independent action. Armstrong subsequently sought to obtain removal to federal court but was unsuccessful.

Thereafter, the ICC decision in No. MC-C-10963, *Armstrong World Industries, Inc. - Transportation Within Texas - Petition for Declaratory Order* was served on April 23, 1986 (hereinafter "*Armstrong I*"). Armstrong then attempted to use *Armstrong I* to obtain dismissal in the state court action before discovery could proceed and otherwise to thwart fact finding in that forum. However, the state district court judge allowed discovery to proceed.

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[3] Texas has obtained copies of two letters between counsel for Armstrong and the General Counsel for the ICC. Appendix A. Further evidence of these as well as other *ex parte* contacts has been obtained through a document index, (Appendix B), received pursuant to a Freedom of Information Act (hereinafter "FOIA") request, as well as in an affidavit submitted in a FOIA lawsuit in the Western District of Texas styled *Texas v. ICC*, Cause No. A-87-CA-016 (W.D. Tex. Austin Div.). Appendix C. In the FOIA action the lower court ordered the ICC to disclose six of the eleven documents Texas requested. That case is also pending in the Fifth Circuit on cross appeals by Texas and the ICC. *Texas v. Interstate Commerce Commission*, U.S.C.A. 5th Cir., No. 88-1223. A motion to consolidate that case with the appeal pending on the Armstrong Petition for Review has been denied. Oral argument in the Armstong Petition for Review has been scheduled for the week of September 5, 1988.

That discovery formed the basis of a Supplemental Petition to Reopen before the ICC.

The Supplemental Petition to Reopen alleged substantial inconsistencies between Armstrong's affidavits before the ICC and an Armstrong witness who was deposed pursuant to discovery in state court. In the meantime, while Texas was preparing this Supplemental Petition to Reopen, Armstrong and the ICC were secretly exchanging drafts of a lawsuit which Armstrong later filed in federal court in the Western District of Texas. This 42 U.S.C. § 1983 and antitrust lawsuit, styled *E & B v. Mattox*, No. A-86-CA-466 (W.D. Tex. Aus. Div.), sought *money damages* and an injunction against state officials for pursuing the state court action. The ICC sought to intervene in that lawsuit one day after it was filed.

After filing the Supplemental Petition to Reopen and learning of the federal court action, Texas moved to dismiss before the ICC on both jurisdictional grounds and grounds of bias.[4] The ICC decided the Petition to Reopen *Armstrong I* against Texas in *Armstrong II* (served August 25, 1987) even though it was aligned with Armstrong as a party in Armstrong's suit for money damages and had sued Texas pursuant to *Armstrong I* in federal district court. Not surprisingly, the ICC found in favor of Armstrong.

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[4] Both of these issues are currently pending before the Fifth Circuit in the Armstrong Petition for Review.

C Proceedings Before The Fifth Circuit

Texas filed its Petition for Review on or about October 15, 1987. Simultaneously, Texas filed a Motion to Summarily Reverse and Vacate or, in the Alternative, to Summarily Dismiss. In that motion Texas contended that *Service Storage and Transfer Co., Inc. v. Virginia*, 359 U.S. 171 (1959), did not apply and that the ICC lacked primary jurisdiction to even issue the declaratory orders under review, let alone obtain the injunction the ICC seeks from this Court. *See infra at* 16-25. This motion was denied by order dated November 19, 1987. Appendix D. However, the Fifth Circuit made no ruling on the questions presented by the motion, but rather ordered full briefing and oral argument on the jurisdictional issues raised in the motion. Oral argument is scheduled on these issues the week of September 5, 1988.

On or about November 17, 1987, the ICC moved for an injunction before the Fifth Circuit pursuant to the All Writs Act, 28 U.S.C. § 1651. In denying the injunction, the Fifth Circuit noted that the Texas appeal was basically jurisdictional with the controversy swirling around the "proper interpretation of *Service Storage & Transfer Co., Inc. v. Virginia* ... ." *Texas v. United States*, 837 F.2d 184, 185 (5th Cir. 1988). Still the court deferred ruling on the merits.

> Obviously, we intimate no opinion as to the merits of the administrative appeal or the state's likelihood of success.

Id. at 185 n.1.

By this Petition for Certiorari based on *Service Storage*, both the ICC and Armstrong seek to have this Court summarily resolve (ICC Petition at 10-11) the very issues for which both the ICC and Armstrong have requested and received oral argument from the Fifth Circuit. *See* ICC Brief, Armstrong Petition for Review at i, Armstrong Brief at vii. In response, this court should summarily deny the ICC's Petition for Certiorari.

REASONS FOR DENYING WRIT

I. This Court Lacks Jurisdiction To Review The Fifth Circuit's Decision

A. This Court Lacks Jurisdiction Absent Proper Representative of the Government

The ICC has confessed in a footnote in its Petition for Certiorari that the Solicitor General has not authorized the filing of the Petition. ICC Petition for Certiorari at 1-2 n.1. Pursuant to 28 U.S.C. § 518(a), "the Attorney General and the Solicitor General shall conduct and argue suits in the Supreme Court . . . in which the United States is interested." *See also* 28 C.F.R. § 0.20 (1982) (delegating to Solicitor General authority as to "[c]onducting, or assigning and supervising, all Supreme Court cases, including appeals, petitions for and in opposition to certiorari, brief and arguments, and . . . settlement thereof.") "Absent a proper representative of the Government as a petitioner . . . jurisdiction is lacking and the writ of certiorari" must be denied. *United States v.*

Providence Journal Co., ____ U.S. ____, ____, 108 S. Ct. 1502, 1511, 99 L.Ed.2d 785, 801 (1988).[5]

B. This Court Lacks Jurisdiction To Decide Merits Before Judgment In the Fifth Circuit

The ICC has contended that interlocutory review is appropriate here because denial of the preliminary injunction is collateral to the proceeding still pending in the Fifth Circuit. ICC Petition at 9. For an order to be collateral *"the order must 'resolve an important issue completely separate from the merits of the action.'"* *Gulfstream Aerospace Corporation v. Mayacamas Corporation*, ____ U.S. ____, _____, 108 S. Ct. 1133, 1137, 99 L.Ed.2d 296, 305 (1988), *citing Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). This proceeding, however, does not seek to "resolve an important issue *completely separate from the merits* of the action." Rather this proceeding seeks by interlocutory review to resolve the proper interpretation of *Service Storage*. The Fifth Circuit explicitly expressed "no opinion as to the merits" of the administrative appeal and expressly left open the proper interpretation of *Service Storage*. *Texas v. United States*, 837 F.2d at 185.

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[5] Although the ICC may have some independent authority to litigate under 28 U.S.C. §§ 2323 and 2348, such authority does not extend to suit in this Court. *See* 28 U.S.C. § 518(a). Moreover the denial of the preliminary injunction by the Fifth Circuit had no effect on the "validity" of the ICC order within the meaning of 28 U.S.C. § 2323. Only after judgment on the merits of the validity of the order is the Armstrong Petition for Review subject to review by this Court. Moreover, neither the Attorney General nor the Solicitor General has, "dispose[d] of or discontinue[d]" the Petition for Review within the meaning of 28 U.S.C. § 2348.

Moreover, this Petition concerns an application for a preliminary injunction. In such an application, this Court must consider the probability of success on the merits in determining whether to issue an injunction. Accordingly, this court must consider not only the jurisdictional issues surrounding the proper interpretation of *Service Storage*, but also all other issues currently pending before the Fifth Circuit. Before the Fifth Circuit, Texas has briefed and argued (1) that the ICC was biased; (2) that assuming the ICC has jurisdiction, it erred in not allowing an oral hearing or allowing discovery, particularly in light of factual inconsistencies and the allegations of bias; and, (3) that the ICC decision holding disputed commerce is interstate is contrary to law and precedent.[6] In effect this Court must review the entire case pending before the Fifth Circuit before a final judgment by that Court.

Although Congress expressly provided in 28 U.S.C. § 1254(1) that the Supreme Court may utilize its certiorari jurisdiction either "before or after rendition of judgment" by a court of appeals, certiorari before judgment is "an extremely rare occurrence." *Coleman v. PACCAR, Inc.*, 424 U.S. 1301, 1304 n.* (1976). Moreover, in cases involving appeals to circuit courts from an administrative agency, exercise of this Court's jurisdiction before a judgment by the court of appeals may be tantamount to an exercise of this Court's original jurisdiction. Stern and Gressman, *Supreme Court Practice* 43-44 (6th ed. 1986). Review by this Court that "embraces

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[6] Tangentially Texas has also argued there was not substantial evidence to support the ICC's administrative decision and that it failed to place the burden on Armstrong to show that the commerce was interstate.

the whole case" as opposed to "definite and distinct questions of law" in advance of any judicial action *on the merits* "would be an exercise of original jurisdiction by this Court contrary to the constitutional provision which prescribes that its jurisdiction shall be appellate in all cases other than those affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party." *Wheeler Lumbers Bridge and Supply Co. v. United States*, 281 U.S. 572, 576 (1930); *see also Civil Aeronautics Board v. American Air Transport*, 344 U.S. 4, 5 (1952) ("This Court does not normally review orders of administrative agencies in the first instance ... ."); *United States v. Rice*, 327 U.S. 742, 747 (1946).

Here, by granting the ICC Petition for Certiorari, this Court would not only be stripping the circuit court of its proper jurisdiction to decide the merits of this controversy, but arguably exercising original jurisdiction without its proper invocation. Accordingly, the Petition should be denied.

C. This Court And Fifth Circuit Lack Jurisdiction To Order Injunctive Relief Under All Writs Act

The ICC brought an original action for an injunction to enforce the Armstrong declaratory order pursuant to 28 U.S.C. § 1651, the All Writs Act. "The All Writs Act is a residual source of authority to issue writs which are not otherwise covered by statute." *Pennsylvania Bureau of Corrections v. United States Marshalls Service*, 474 U.S. 34, 43 (1985). However, when a statute specifically addresses a particular situation, it controls rather than the All Writs Act. *See id.*

In this situtation, 28 U.S.C. § 1336(a) expressly provides that "the *district courts shall* have jurisdiction of any civil action to *enforce* in whole or in part, any order of the Interstate Commerce Commission ... ." (Emphasis added). *See also* 28 U.S.C. § 2321(b) ("The procedure in the *district courts* in actions to enforce in whole or in part *any* order of the Interstate Commerce Commission other than for payment of money or the collection of fines, penalties and forfeitures, shall be as provided in this chapter.") (emphasis added).

Here, these more specific sections control over the residual All Writs Act provision invoked by the ICC. *See Pennsylvania Bureau of Corrections*, 474 U.S. at 43. Accordingly, because Congress has expressly indicated that enforcement of an ICC order must first proceed in federal district court, this Court, like the Fifth Circuit, lacks jurisdiction to consider the injunctive relief sought. This is particularly true in the present case where the ICC has previously moved in a federal district court for the very relief requested here. In an order dated October 7, 1986, Judge Smith, in *E&B Carpet Mills v. Jim Mattox*, Civil Action No. A-86-CA-446, after considering the four requirements for a preliminary injunction, denied the identical relief sought here, holding that:

> The Court, *after examining the entire record, finds that the Plaintiff has failed to establish irreparable harm at this time and that the preliminary injunction should be denied.* While the harm to Plaintiff may be difficult to prove, the Court finds that damages could be determined.

ICC Petition, Appendix G at 48-50a (emphasis added). This court lacks jurisdiction to entertain an action seeking to attack Judge Smith's order collaterally, particularly when "[n]either Armstrong nor the ICC appealed the decision though entitled to by 28 U.S.C. § 1292(a)." *Texas v. United States*, 837 F.2d at 186.[7]

D. ICC Lacked Jurisdiction To Issue The Orders Sought To Be Enforced, Consequently This Court Has No Authority To Enforce Them

Aside from the above jurisdictional arguments, which are specific to this proceeding, Texas has contended in the Fifth Circuit that the ICC lacked jurisdiction to even issue the orders in *Armstrong I* and *II*, let alone obtain an injunction. Alternatively Texas has argued that the ICC and federal courts must abstain in deference to the ongoing action in state court and that the declaratory orders issued in *Armstrong* are advisory and not subject to review. However, before presenting those arguments (*see infra* at 16-25), which constitute the merits of the controversy in the Fifth Circuit, this Court should consider several prudential reasons for denying the writ.

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[7] The ICC has acknowledged that it has filed another motion for an injunction before Judge Smith but that he has not ruled on it. ICC Petition at 4 n.6. Rather than an original action for an injunction in the Fifth Circuit, the ICC should have sought to mandamus the district court to rule on the motion.

II. For Prudential Reasons This Court Should Deny The Writ

A. To Grant Certiorari Here Would Be An Uneconomical Use Of Judicial Resources Because It Is Unlikely This Court Could Decide Whether An Injunction Should Issue Before The Fifth Circuit Rules On the Merits

The Fifth Circuit has scheduled oral argument in the Armstrong Petition for Review the week of September 5, 1988. Given the time it will take to decide this Petition, set up a briefing schedule, calendar oral argument, and render an opinion, it is very unlikely this Court can render a ruling before the Fifth Circuit decides the merits of the Armstrong Petition for Review. Accordingly, this Court could better employ its resources than by granting certiorari.

B. Circuit Courts Should Have the Opportunity To Interpret *Service Storage*

Aside from the *Armstrong* proceeding, there are at least six (6) other cases that have either been decided by the ICC or are currently pending that involve the same fact pattern as is present here.[8]

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[8] *Matlack, Inc. -- Transportation Within Missouri -- Petition for Declaratory Order*, ICC Docket No. MC-C-10999 (hereinafter "Matlack"); *Quaker Oats Company -- Transportation Within Texas and California -- Petition for a Declaratory Order*, Docket No. MC-C-30006 (hereinafter "Quaker Oats"); *Victoria Terminal Enterprise, Inc. - Transportation of Fertilizer Within Texas - Petition for Declaratory Order*, Docket No. MC-C-30002 (hereinafter "Victoria Terminal"); *James River Corporation of Virginia- Transportation Through Woodland, California - Petition for*

Three of these cases, like the Petition for Review filed in *Armstrong*, have made their way to courts of appeal in the various circuits.[9]

None of the cases filed in the circuit courts has been decided, although all cases present the identical jurisdictional argument that is present in this case. *See infra* at 16-25. Rather than seizing jurisdiction from the Fifth Circuit to decide these issues as the ICC suggests, this Court should allow the issues to percolate in the various circuits, then see if a conflict arises.

Declaratory Order, Docket No. MC-C-30044; *RAC Transport Company Inc. - Transportation of Appliances Within Colorado - Petition for Declaratory Order*, Docket No. MC-C-30052; *Bigbee Transportation, Inc. - Transportation Within Alabama, Mississippi and Georgia - Petition for Declaratory Order*, Docket No. MC-C-30065.

[9] *Matlack* is filed in the Eighth Circuit under two docket numbers: *Middlewest Motor Freight Bureau v. Interstate Commerce Commission*, No. 87-2043 and *Steere Tank Lines, Inc. v. Interstate Commerce Commission*, No. 87-2429. *Quaker Oats* is pending in the Ninth Circuit also under two dockets: *California Trucking Association, Inc. v. United States of America*, No. 87-7439 and *Steere Tank Lines, Inc. v. Interstate Commerce Commission*, No. 88-7041. *Victoria Terminal* is pending in the Fifth Circuit: *Steere Tank Lines, Inc. v. United States of America*, No. 88-4001. Copies of both the initial decisions ("*Matlack I*," "*Quaker Oats I*," *and* "*Victoria I*") and the decisions on discretionary appeal ("*Matlack II*," "*Quaker Oats II*," "and "*Victoria II*") have been lodged with the Clerk of this court.

C. The Issue of Whether An Injunction Should Issue Is Case Specific And Not Worthy Of This Court's Review

In determining the ICC's probability of success on the merits, this Court would have to review the factual allegations of bias surrounding the ICC's *ex parte* communications with Armstrong. The Court must also consider the ICC's alignment with Armstrong in the federal lawsuit against Texas officials seeking to enforce *Armstrong I* while *Armstrong II* was still pending. Under these circumstances the ICC and Armstrong lack the clean hands necessary for the equitable relief they seek. Moreover, the ICC is silent in its Petition for Certiorari as to likelihood of success on the merits regarding whether a hearing before the ICC should have been granted or whether precedent was properly applied to the facts in the ICC's determination that the disputed commerce was interstate.[10]

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[10] Similarly, the ICC's allegation of irreparable injury is contradicted by Judge Smith's order, never appealed, which found to the contrary. The ICC's attempts to psychoanalyze that opinion (ICC Petition at 4 n.6) cannot stand in light of the fact that the ICC was present at the hearing to advance its interests and the Court ruled "after examining the entire record." Moreover, the ICC is not a party to the state court proceeding and lacks standing to seek an injunction against a proceeding in which it has no stake in the outcome. Ironically, although Armstrong does have an economic interest in the state court action, Armstrong set the action for trial (Appendix E) and consequently should now be estopped from seeking to enjoin the very proceeding it sought to try.

These facts, all of which this Court must consider, belie the ICC's suggestion of a "clear cut" legal issue concerning the proper application of *Service Storage*. To the contrary, this particular case is adrift in factual claims of bias, collusion, and governmental misconduct. Should the Court desire to review *Service Storage* or its application, the Court should await a case in less troubled seas.

III. ICC Cannot Prevail On The Merits Of The Armstrong Petition For Review

A. ICC Lacked Jurisdiction To Issue The Armstrong Declaratory Orders

Congress has explicitly provided that the Interstate Commerce Act does not "affect the power of a state to regulate intrastate transportation provided by a motor carrier." 49 U.S.C. § 10521(b)(1). Congress alone creates the jurisdiction of federal agencies, not the agencies themselves: "An agency may not confer upon itself power." *Louisiana Public Service Commission v. F.C.C.*, 476 U.S. 355, ____, 106 S. Ct. 1890, 1901, 90 L.Ed.2d 369, 385 (1986). *See also Funbus Systems, Inc. v. State of California Public Utilities Commission*, 801 F.2d 1120, 1129 (9th Cir. 1986) (ICC does not "have the power to draw the boundaries of its own authority to regulate"). A statute such as 49 U.S.C. § 10521(b)(1) is a "bar to federal preemption of state regulation ... ."[11] *Louisiana Public Service Commission*, 476 U.S. at ___, 106 S. Ct. at 1904, 90 L.Ed.2d at 388.

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[11] In support of its preemption argument the ICC has relied on *Missouri Pacific Railroad Company v. Railroad Commission of Texas*, 617 F. Supp. 653 (W.D. Tex. 1987). ICC Petition at 5 n.11 That decision was substantially reversed at 833 F.2d 570 (5th Cir. 1987).

The ICC cannot use an anticipatory proceeding such as an action for declaratory relief pursuant to 5 U.S.C. § 554(e) of the Administrative Procedure Act (hereinafter "APA") as a means to expand its jurisdiction. *See Califano v. Sanders*, 430 U.S. 99, 107 (1977) (APA provides no implied grant of subject matter jurisdiction); *see also Illinois Terminal Railroad Co. v. ICC*, 671 F.2d 1214, 1216 (8th Cir. 1982) (APA provides no implied grant of subject matter jurisdiction, so some other underlying authority for issuance of declaratory order must exist).

Historically, state courts, not the ICC, have had primary jurisdiction to determine the issues at stake here:

> *It is the state courts which have the first and the last word* as to the meaning of state statutes and whether a particular order is within the legislative terms of reference so as to make it the action of the State. *We have disapproved anticipatory declarations* as to state regulatory statutes, even where the case originated in and was entertained by courts of the State affected.

Public Service Commission of Utah v. Wycoff Co., 344 U.S. 237, 247 (1952) (emphasis added); *see also United States v. Idaho*, 298 U.S. 105, 109 (1936) (question as to interstate nature of railroad track should be decided by courts, not governmental agencies).

Moreover, it has long been well established that "*[f]ederal courts will not seize litigation from state courts merely because one, normally a defendant, goes to federal court to begin his federal law defense before the state court begins the case under state law.*" *Public Service Commission v. Wycoff*, 344 U.S. at 248 (emphasis added); *see also Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, ____, 106 S. Ct. 3229, 3232, 92 L.Ed.2d 650, 658 (1986) ("A *defense* that raises a federal question is inadequate to confer federal jurisdiction.") (emphasis added); *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 14 (1983) ("since 1887 it has been settled law that a case may not be removed to federal court on the basis of a federal defense, including the defense of preemption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case.");[12] *Skelly Oil Co. v. Phillips Petroleum*, 339 U.S. 667, 672 (1950); *Beers v. North American Van Lines Inc.*, 836 F.2d 910, 913 (5th Cir. 1988) (Fifth Circuit, *sua sponte*, dismissed appeal of an action

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[12] Here, Armstrong, contending that the commerce at question was interstate, carried its defense directly to the ICC rather than raising such defense in the context of a state court enforcement action. In effect Armstrong sought removal in two steps. *First*, file a Petition for Declaratory Order before the ICC. *Second*, after an ICC decision, force Texas to file for review. The fact that Armstrong seeks removal via a Petition for Declaratory Order pursuant to 5 U.S.C. § 554(e) and review of that order by a federal court cannot establish federal question jurisdiction if it is otherwise lacking. *See Califano v. Sanders*, 430 U.S. at 107 (APA provides no implied grant of subject matter jurisdiction).

which had been removed to federal court based on preemption defense under Interstate Commerce Act); *Greenfield & Montague Transportation Area v Donovan*, 758 F.2d 22, 26 (1st Cir. 1985) (plaintiffs may not use federal law to engage in preemptive strike against state court jurisdiction).[13]

These arguments are particularly compelling in the instant case because, here, a state court has already determined that the subject commerce is intrastate and issued an order enjoining the disputed movements. *See* ICC Petition, Appendix H, 51-53a. It is a well settled principle that federal appellate review of state court judgments can only occur in the Supreme Court on appeal or by Writ of Certiorari. *District of Columbia Court of Appeal v. Feldman*, 460 U.S. 462, 482 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416 (1923). The Fifth Circuit already recognized these principles in *Texas v. United States*, 837 F.2d 184, 186 (5th Cir. 1988): "[T]he state court's application of the ICC's order could be reviewed in due course by the United States Supreme Court."

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[13] In another context the ICC has openly acknowledged these important jurisdictional and federalism issues in refusing to entertain a proceeding to establish rules as to what constitutes interstate or intrastate commerce: "Insofar as Petitioner urges us to take jurisdiction as a convenient and expeditious means of defeating State efforts to assume jurisdiction, we cannot do so." *United States Department of Transportation -- Petition for Rulemaking -- Single State Transportation in Interstate or Foreign Commerce, Ex Parte* No. MC-182, slip op. at 6 (hereinafter "DOT") served on January 28, 1987. That reasoning under the authority cited above, applies as well to individual adjudications. A copy of the DOT slip opinion has been lodged with the Clerk of this Court.

B. *Service Storage* Does Not Apply Where Commerce Is Facially Intrastate

Nothing in *Service Storage & Transfer Co. v. Virginia*, 359 U.S. 171 (1959) changes this analysis. In *Service Storage*, the Virginia State Corporation Commission brought an enforcement action against a company which routed goods from Virginia through a "gateway" terminal in West Virginia and back into Virginia. Virginia contended that those interstate shipments were "a mere subterfuge to escape intrastate regulation and evade its jurisdiction." *Id.* at 175.

Prior to any decision by the Virginia State Corporation Commission, Service Storage petitioned the ICC for a declaratory order interpreting its certificate. Thereafter, Virginia's Commission decided that Service Storage was operating intrastate and fined them for operating without intrastate authority. Subsequently, the ICC issued its opinion construing Service Storage's certificate as authorizing the interstate routing.

In a narrow opinion decided only "*under the facts here*," this Court ruled that the "interpretation of petitioner's interstate commerce certificate should first be litigated before the Interstate Commerce Commission ... ." *Id.* at 173. This Court further circumscribed its ruling with a telling rationale directed at the possibility of multiplicitous litigation:

> Thus the possibility of a multitude of interpretations of the same federal certificate *by several States* will be avoided and a uniform administration of the Act achieved.

Id. at 179 (emphasis added).

Here the facts are very different from the situation in *Service Storage*. First and most significant, the shipments in *Armstrong* are on their face *intrastate*. This is unlike *Service Storage* where Virginia never contested the fact that the shipments moved interstate. Rather, Virginia maintained such interstate movements were a subterfuge to evade its jurisdiction.[14] Further, there is no concern here, as was the case in *Service Storage*, of a possible "multitude of interpretations of the same federal certificate by *several* States"[15] since the subject

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[14] Necessarily, under § 10521(a)(1), when movements are involved which are on their face interstate, the ICC has jurisdiction to decide whether the routing between the states is a subterfuge. Conversely, under §10521(b)(1), when the subject commerce is facially intrastate, the state, not the ICC, has jurisdiction to decide the nature of that commerce. Any other interpretation of the concurrent jurisdictional scheme over motor carriers set out in § 10521 would fail to give effect to all of its provisions.

[15] The ICC has also relied on *Jones Motor Co. v. Pennsylvania Public Utility Commission*, 361 U.S. 11 (1959) and *Castle v. Hayes Freight Lines*, 348 U.S. 61 (1954). *Jones* involved a situation, like *Service Storage*, where the questioned traffic was across state lines and the state commission, not the ICC, had erroneously declared this traffic a subterfuge. *See Jones Motor Company v. Pennsylvania Public Utility Commission*, 149 A.2d 491 (Pa. Super. Ct. 1959). Similarly, *Castle* applied only to ICC jurisdiction over interstate commerce across state lines because the Court had earlier dismissed an appeal of Hayes' suspension from intrastate operations for want of a substantial federal question. *See Castle*, 348 U.S. at 63 n.5.

Here, unlike *Jones*, *Castle*, and *Service Storage*, the subject commerce moves solely within Texas. *Compare Jones* (subject commence interstate: Pennsylvania - New Jersey - Pennsylvania) and *Castle* (subject commerce interstate:

commerce is solely within Texas. Moreover, Texas does not seek any interpretation of Reeves' interstate certificate. In fact, whether Reeves possesses an ICC certificate is irrelevant to the state enforcement action, which seeks only to enjoin intrastate violations of a Texas statute.[16]

C. Even Assuming The ICC Had Jurisdiction, Under *Younger-Burford* Analysis The ICC Or This Court Should Decline To Exercise It

In refusing to enjoin the state court enforcement action, the Fifth Circuit, citing *Younger v. Harris*, 401 U.S. 37, 44-45 (1971), reasoned "we are guided by the overarching principle that federal courts are to be cautious about infringing on the legitimate exercise of state judicial power." *Texas v. United States*, 837 F.2d at 186. Given 49 U.S.C. § 10521(b)(1), the court noted that "the ICC points to no authority indicating that Congress has tipped the

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(Illinois - Seven other states - Illinois) *and Service Storage* (subject commerce interstate: Virginia - West Virginia - Virginia) *with Armstrong* (subject commerce intrastate: Texas - Texas).

16 "The mere possession of an ICC certificate cannot convert ... intrastate activities into violations of federal law." *Schenck Transportation, Inc. v. Inter-County Motor Coach, Inc.*, 350 F.Supp. 306, 309 (E.D.N.Y. 1972). Nor can an ICC certificate "provide a bootstrap for finding federal ... court jurisdiction ... ." *Id.* The sole issue here is whether certain motor carrier traffic within a single state is interstate or intrastate and who has jurisdiction to decide. The ICC specifically acknowledged this in *Armstrong I*: "All parties agree that the issue presented here is whether the movements of non-sidemarked carpet from Arlington to other Texas points are interstate or intrastate in nature." *Armstrong I*, slip op. at 2; ICC Petition at Appendix E at 14a.

balance in favor of federal interests." *Id.* at 187. *Accord Louisiana Public Service Commission*, 476 U.S. at _____, 106 S. Ct. at 1901, 90 L.Ed.2d at 385 (provisions such as 49 U.S.C. § 10521(b)(1) constitute an express congressional denial of power to agency); *see also New Orleans Public Service, Inc. v. City of New Orleans*, 798 F.2d 858, 860 (5th Cir. 1986), *cert. denied*, ____ U.S. ____, 107 S. Ct. 1910, 95 L.Ed.2d 515 (1987) (where Congress creates a "bright line" between federal and state jurisdiction, "federal court intervention ... may constitute a disruption of a state regulatory scheme" in an area of regulation which "is clearly a field left to the state."); *Burford v. Sun Oil Co.*, 319 U.S. 315, 327 (1943).[17]

Moreover, abstention is especially appropriate where the federal adjudication is advisory:

> In some cases, the probability that any federal adjudication would be effectively advisory is so great that this concern alone is sufficient to justify abstention, even if there are no pending state proceedings in which the question could be raised.

Pennzoil v. Texaco, ____ U.S. ____, 107 S. Ct. 1519, 1526 n.9, 95 L.Ed.2d 1, 16 n.9 (1987); *see also Railroad Commission of Texas v. Pullman Co.*, 312 U.S.

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[17] The injunction is also barred by the Anti-Injunction Act, 28 U.S.C. § 2283. *See Chick Kam Choo v. Exxon Corp.*, ___ U.S. ___, ___, 108 S. Ct. 1684, 1691, ___ L.Ed.2d ___, ___ (1988) ("We simply hold that respondents must present their pre-emption argument to Texas state courts, which are presumed competent to resolve federal issues.")

496 (1941). Here, even the ICC has emphatically recognized the orders are advisory.

Most recently in a declaratory order proceeding identical in type to the instant case the ICC noted, in what has become almost boilerplate in these type cases, that:

> *This is a declaratory order proceeding, not an adversary proceeding.* There is no need of oral hearing in this case because the purpose of a declaratory order is simply to remove uncertainty as to the legal effect of the fact pattern presented by the party requesting the declaration. *It is not a verification of those "facts," nor does it apply to any different circumstances (which may or may not differ materially for purposes of the legal analysis involved).* This proceeding involves neither an application nor a complaint, and *it makes no final determination as to any specific rights of any party.* Our decision is simply our interpretation of the applicable law as it applies to a given set of facts.

Victoria II, slip op. at 1-2 (emphasis added); *see also Quaker Oats II*, slip op. at 1;[18] *Matlack I*, slip op. at 1 and *Matlack II*, slip op. at 3-4. Moreover, although not using identical language, the ICC in *Armstrong II* noted it was not deciding specific factual and legal controversies as to "whether every individual shipment has moved lawfully in Interstate Commerce ... ." *Armstrong II*, slip op at 8; ICC

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[18] *See also Ouaker Oats I*, slip op. at 2, fn. 4.

Petition, Appendix F at 45-46a. Rather, the ICC admitted its interpretation was purely abstract, dealing with "the nature and concept of disputed commerce as a whole ... ." *Id.*

Given this persistent and consistent message from the agency itself, it cannot be seriously disputed that declaratory orders, such as those issued herein, are nonfinal and not subject to review. *Port of Boston Marine Terminal Association v. Rederiaktiebolajet Transatlantic*, 400 U.S. 62, 71 (1970); *United States v. Los Angeles and S.L.R.*, 273 U.S. 299, 310 (1927) (ICC Order "does not determine any right or obligation" and "is merely the formal record of conclusions reached after a study of data ... ."). *See also Texas v. United States*, 837 F.2d at 186 (refusing to enforce ICC orders at issue here and holding them subject to state court "interpretation"); *City of Miami v. ICC*, 669 F.2d 219, 221-222 (5th Cir. 1982).

CONCLUSION

Wherefore, for the aforesaid reasons, Texas requests the Petition for Certiorari be denied.

Respectfully submitted,

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July, 1988

APPENDIX A

October 25, 1985

Robert S. Burk, Esquire
General Counsel
Interstate Commerce Commission
12th & Constitution Ave., N.W.
Room 5211
Washington, DC 20423

Re: *The State of Texas v. E&B Carpet Mills, A Division of Armstrong World Industries, Inc., and Reeves Transportation Company of Georgia*
Travis County, Texas, District Court
Case No. 386524

Dear Mr. Burk:

E&B Carpet Mills, a division of Armstrong World Industries, Inc. (E&B), as here pertinent manufactures carpet at or near Dalton, Ga., and ships carpet from its mill and warehouse facilities at Dalton, Ga., to its Arlington, Tex., service center. From Arlington, shipments are made to customers in Texas as well as to customers in other southwestern states. It is E&B's fixed and persisting intent that the shipments remain in interstate commerce until delivery to the ultimate customers. The shipments from the Arlington warehouse to points in Texas that move by Reeves Transportation Company of Georgia (Reeves) have freight charges prepaid by E&B. Other carriers, secured by the consignees, also pick up and deliver shipments from Arlington to points in Texas.

A controversy has arisen concerning whether the shipments form Arlington to points in Texas which are transported by Reeves under the Armstrong prepaid freight program are shipments in interstate or intrastate commerce. In an attempt to resolve the problem, and to obtain guidance for future shipments, a petition for declaratory order was filed by E&B in Docket No. MC-C-10963. A proceeding was in fact instituted, and the deadline for filing of initial comments was October 7, 1985. Numerous parties, included the Texas Railroad Commission and the Attorney General of Texas, as well as certain Texas intrastate carriers, participated in the filing of comments in those proceeding. However, on October 3, 1985, the Attorney General filed the referenced court case in the District Court of Travis County, Texas, seeking a preliminary and permanent injunction, as well as money damages, in an attempt to halt transportation by Reeves from the Arlington service center to points in Texas. Reeves holds no Texas intrastate authority. Reeves doe hold proper authority from the Interstate Commerce Commission in Docket No. MC-129537, Sub No. 68. A more complete statement of the facts is contained in the E&B comments filed on October 7, 1985, copy attached.

An informal understanding had been reached with an Assistant Attorney General of Texas that no action

would be taken in state court until the Interstate Commerce Commission declaratory order proceeding was concluded, if at all. However, it appears that the Texas Railroad Commission has agitated for action by the Attorney General, and that is what has given rise to the suit.

On behalf of E&B, we are attempting to remove the referenced case to federal district court in Austin, Tex. However, because the complaint is worded so as not directly to mention any federal issue, and because the State of Texas is not a citizen for purposes of diversity, it is not certain that our removal effort will succeed, even though we have found one similar case in which removal was permitted and upheld on appeal. *Blease, et al. v. Safety Transit Co.*, 50 F.2d 852 (4th Circuit, 1931). Should removal be successful, then we of course expect to request the federal district court in Austin to refer the matter to the Interstate Commerce Commission on the issue of whether or not interstate commerce is involved, and that the court will honor the request.

Our apprehension, of course, is that under the present procedural posture, the federal district court may remand the case to the Texas District Court. Should this occur, then we feel it would be highly desirable for the Interstate Commerce Commission to intervene in the Texas District Court, as a third party

plaintiff in order to assert its right to regulate interstate commerce involving movements within Texas. Then, with a federal issue apparent on the face of the commission's pleading, we could again move for removal with some reasonable likelihood of success.

The situation involved here is a very thorny one, and one which I have encountered numerous times during the last 20 years of practice in the area of transportation law. Drawing a line between what constitutes interstate commerce and intrastate commerce is troublesome at best. It was in view of this situation that E&B has, in its comments, requested the Commission to establish a "safe harbor" rule that would greatly assist in establishing the dividing line. Unfortunately, action taken by the State of Texas now may serve merely to obfuscate matters, at least in the near term. Appropriate action on your part, after instruction and authorization by the Interstate Commerce Commission, would help to assure that this matter will be concluded in an orderly fashion and with a minimum amount of litigation.

Service of the plaintiff's original petition, a copy of which is attached, occurred on October 17, 1985. It is my understanding, although I am not a member of the Texas Bar, that E&B has 20 days within which to answer. Therefore, time is of the essence in

obtaining Interstate Commerce Commission action. Your early response would be appreciated.

With kindest personal regards, I remain,

Very truly yours,

/s/ W. P. Jackson, Jr.
William P. Jackson, Jr.

WPJ/smw
Enclosures
cc: Jerome C. Finefrock, Esquire

October 31, 1985

Mr. William P. Jackson, Jr.
Jackson & Jessup
P.O. Box 1240
Arlington, VA 22210

Re: *State of Texas v. E&B Carpet Mills, et al.*,
Trans [sic] County (Tex.) Judicial District Court,
No. 386524

Docket No. MC-C-10963, *Armstrong World Industries, Inc. - Transportation Within Texas - Petition for Declaratory Order*

Dear Mr. Jackson:

In your letter of October 25, 1985, you requested our views on the possibility of ICC intervention in the above-referenced state court proceeding. The state court action arises out of a complaint by the Texas Attorney General seeking to enjoin a motor carrier from providing what is alleged to be intrastate transportation without holding state-issued operating authority. The carrier contends, however, that the movements are interstate in nature and are therefore authorized by its ICC-issued certificate. (Whether the ICC certificate actually authorizes the operations is now before the Commission in the above-referenced declaratory order proceeding.)

In general, the Commission has taken a firm position in support of its exclusive jurisdiction to

make the initial interpretation of a federal motor-carrier certificate, as established in *Service Storage & Transfer Co. v. Virginia*, 359 U.S. 171 (1959) and *Jones Motor Co. v. Penn. PUC*, 361 U.S. 11 (1959). For example, my staff has already provided you with copies of our briefs in the recent *Funbus* litigation, where the California PUC has attempted to enjoin a federally certificated carrier's operation in a state administrative proceeding. The ICC intervened there once the ICC-certificated carrier had succeeded (at least temporarily) in having the case presented in a federal rather than state forum.

In the present case, although the ICC's interpretive jurisdiction seems equally clear and has been invoked via the declaratory order proceeding, we are reluctant to recommend that the Commission should become involved in a controversy that is still in a state forum. If the case were already presented in a federal court either via removal or a separate federal complaint for injunctive relief, as in *Funbus*, the situation would be quite different. As it is, we believe it to be in the Commission's interest to fight this battle, if at all, in a federal forum. Accordingly, we do not plan to make any recommendation regarding ICC intervention in the state court proceeding. We hope, however, that you will keep us apprised of any further developments. If the case

reaches a federal court, we will be glad to discuss the Commission's interest in possible direct participation at that point.

Sincerely,

/s/ Robert S. Burk
Robert S. Burk
General Counsel

APPENDIX B

DOCUMENT INDEX

Documents Withheld:

1. General Counsel Memorandum 11/25/85, To Chairman Taylor, No. 85-287, Re: Docket No. MC-C-10963.

2. Letter from General Counsel to William P. Jackson 11/25/85, Re: Commission vote for ICC appearance in non-enforcement judicial proceedings.

3. Letter from William P. Jackson to General Counsel 11/12/85, Re: Request for ICC appearance in *Texas v. E&B Carpet Mills.*

4. Memorandum to Director Mackall from General Counsel 3/14/86, No. 86-52, Re: Modification to prior G.C. Memorandum No. 85-287.

5. Draft Decision for No. MC-C-10963, 2/_/86.

6. Draft Decision for No. MC-C-10963, 3/20/86.

7. Draft Memorandum of Law 9/5/86, re: *E & B Carpet Mills and ICC v. Jim Mattox, et al.*

8. General Counsel Memorandum 8/1/86, Re: 5th Circuit granting motion to dismiss petition as premature.

9. Letter from R. James George to Glenn Scammel 8/8/86, and attached draft of complaint.

10. Letter from R. James George to Glenn Scammel 8/13/86, and attached draft of complaint.

11. Draft of Complaint from W.P. Jackson.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

STATE OF TEXAS, Plaintiff,	)	
v.	)	Civil Action No. A-87-CA-016
INTERSTATE COMMERCE COMMISSION Defendant.	)	

AFFIDAVIT OF INTERSTATE COMMERCE COMMISSION FREEDOM OF INFORMATION/PRIVACY OFFICER S. ARNOLD SMITH

I, S. Arnold Smith, being duly sworn, depose and state:

I am an attorney employed by the Interstate Commerce Commission as its Freedom of Information/Privacy Officer. I have served in this position since February 1, 1979. Pursuant to Commission regulation (49 C.F.R. 1001.4), I am responsible for initially deciding whether documents requested under the Freedom of Information Act will be made available. The statements made in this affidavit are based on my person knowledge and upon information available to me in my official

capacity, and are true and accurate to the best of my knowledge and belief.

By letter dated October 13, 1986 (Plaintiff's Ex. A), Mr. Robert Ozer, a Texas Assistant Attorney General, Energy Division, requested, inter alia, certain documents relating to an ongoing Commission proceeding, Docket No. MC-C-10963, *Armstrong World Industries, Inc. - Transportation Within Texas - Petition for Declaratory Order (Armstrong)*, and federal court litigation in *E&B Carpet Mills v. Mattox*, No. A-86-CA-446 (W.D. Tex.) (*E&B Carpet Mills*). After a search of the agency's records, I responded to Mr. Ozer's request by releasing some documents, but withholding 11 others pursuant to 5 U.S.C. 552(b)(5) (the executive and attorney work-product privileges incorporated under that section).

In order to understand the basis for may [sic] determinations a short discussion of the *Armstrong* and *E&B Carpet Mills* proceedings is in order. The *Armstrong* proceeding was initiated before the Interstate Commerce Commission by Armstrong World Industries, Inc. (which has a division, E&B Carpet Mills, that manufactures carpet) and Reeves Transportation Company of Georgia, a federally licensed interstate common carrier, to determine whether Reeves' movements of "non-sidemarked" carpet from Arlington to other Texas points were interstate or intrastate in nature. The State of Texas filed comments in the proceeding. By decision served April 23, 1986, the Commission found that

the incidents surrounding the involved transportation established that the movements of non-sidemarked carpet within Texas by Reeves were interstate in nature, lawfully performed under a storage-in-transit provision contained in an appropriate tariff. The State of Texas filed a petition to reopen that decision that is presently pending before the agency.

E&B Carpet Mills is a proceeding presently pending in the United States District Court for the Western District of Texas, Austin Division. There, the plaintiffs, Reeves and E&B, seek injunctive relief from the federal court to prevent the state defendants from pursuing litigation in state court against Reeves and E&B for activities conducted under color of Reeves' federal motor carrier certificate.[1] The Interstate Commerce Commission has moved to intervene in support of E&B and Reeves' motion. The Commission seeks to participate to assert its interest in, and preserve its exclusive original jurisdiction over, the interpretation of the scope of Reeves' federal interstate operating authority and the related tariffs reflecting Reeves'

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[1] The state defendants are the Attorney General of the State of Texas and certain members of his staff. In October 1985, while the *Armstrong* proceeding was pending before the Commission, these defendants filed on behalf of the State of Texas a suit against Reeves (and its principal shipper, E&B) for injunctive relief and penalties under state law for allegedly "unauthorized" Reeves operations in Texas. *State of Texas v. E&B Carpet Mills, et al*, 353d Judicial District Court, Travis County, Texas, No. 386,524.

interstate service. By order signed October 7, 1986, United States District Judge Walter S. Smith, Jr. denied E&B's motion for a preliminary injunction because there was no showing of irreparable harm. E&B subsequently filed a renewed motion for preliminary injunction that is presently pending before the Court.

The documents withheld and the reasons why they were withheld are connected with the proceedings described above. I will now describe with particularity the documents and exemptions claimed.

1. Description: This is a six-page memorandum dated November 25, 1985, from ICC General Counsel Burk to ICC Chairman Taylor. It provided the Chairman with legal analysis of the Commission's primary jurisdiction to interpret the bounds of certificates that it issues. It further discussed the impact of state court action by Texas on that jurisdiction and possible intervention in a federal action to protect the agency's primary jurisdiction to interpret Reeves' federal motor carrier certificates in the pending declaratory proceedings (*Armstrong*).

   Exemption: This memorandum was withheld under the executive process and attorney work-product privileges. The memorandum is a deliberative and confidential intra-agency

memorandum containing legal analysis and recommendations from the agency's General Counsel to the Chairman. The document is also attorney work-product because it was prepared by agency attorneys in anticipation of the litigation in *E&B Carpet Mills*.

2. Description: This is a letter, dated November 25, 1985, from ICC General Counsel Burk to William F. Jackson, Jr., counsel for E&B and Reeves, regarding a Commission vote for ICC appearance in non-enforcement judicial proceedings.

Exemption: This letter was withheld pursuant to the attorney work-product privilege. It was prepared by Commission counsel in contemplation of the litigation in *E&B Carpet Mills* and discusses strategy related to the litigation.

3. Description: This is a letter, dated November 12, 1985, from William P. Jackson, Jr., counsel for E&B and Reeves, to ICC General Counsel Burk, requesting Commission participation in litigation to assert the agency's primary jurisdiction.

Exemption: This letter was withheld pursuant to the attorney work-product privilege.

Although it was prepared by counsel not employed by the agency, the Commission intervened in the subsequent federal court action supporting E&B and Reeves' claim that the Commission has primary jurisdiction to determine the matter. This and other shared communications regarding trial strategy between co-counsel on the same side of the primary jurisdiction litigation remain privileged.

4. Description: This is a two-page memorandum, dated March 14, 1986, from ICC General Counsel Burk to Director Mackall containing commentary on the legal defensibility of the draft decision in *Armstrong*.

Exemption: This memorandum was withheld under the executive and attorney work-product privileges. The document is an intra-agency memorandum between agency staff with respect to a draft decision in *Armstrong*. The memorandum is further protected as attorney work-product because it was prepared in anticipation of litigation when the Commission's decision is reviewed on appeal. Indeed, an attempt has already been made to obtain judicial review of the agency's April 23, 1986 *Armstrong* decision. *Texas v. United States*, No. 86-4430 (5th Cir. July 25, 1986)

(dismissing as premature the Texas petition for review of *Armstrong* without prejudice to refiling after the Commission has acted on pending motions for reconsideration).

5. Description: This is a 13-page draft decision in *Armstrong* circulated between Commission staff in February, 1986.

   Exemption: This document was withheld pursuant to the executive privilege. It is a predecisional working draft decision in the *Armstrong* case.

6. Description: This is a 13-page draft decision in *Armstrong* and one-page memorandum to the Commission, dated March 20, 1986.

   Exemption: As with document 5 above, this document was withheld pursuant to the executive privilege. The document is a predecisional working draft decision in the *Armstrong* case circulated between agency staff.

7. Description: This is a 17-page draft memorandum of law dated 9/5/86 prepared by counsel for E&B for the *E&B Carpet Mills* litigation.

Exemption: This document was withheld pursuant to the attorney work-product privilege. It was prepared by counsel for E&B and contains their strategy and theories in the *E&B* case. It was shared with Commission counsel because they intervened to support E&B's request for an injunction (on the basis ot [sic] the Commission's primary and exclusive jurisdiction to interpret the scope of interstate motor carrier certificates it issues).

8. Description: This is a one page memorandum dated August 1, 1986, from Acting ICC General Counsel Rush to the Commission discussing the decision in *State of Texas v. United States*, No. 86-4430 (5th Cir. July 25, 2986 [sic]).

Exemption: This document was withheld under the executive and the attorney work-product privileges. It is protected under the former privilege because it is on intra-agency memorandum, discussing the impact of this decision on the pending agency proceedings (*Armstrong*). It is attorney work product because it contains counsel's analysis and was prepared in connection with litigation in the Fifth Circuit that the agency anticipates may continue.

9. Description: This is a letter dated August 6, 1986, from R. James George, Jr., counsel for E&B, to Glenn Scammel, at the time an attorney in the ICC General Counsel's Office, regarding a proposed complaint in *E&B Carpet Mills*. Attached to it is a nine-page draft complaint for the E&B litigation.

Exemption: This document was withheld pursuant to the attorney work-product privilege. The document contains counsel's litigation strategy and theories. It was prepared by E&B's attorneys in anticipation of the E&B litigation and was shared with Commission counsel who have filed in support of E&B's complaint in United States District Court (in order to protect the agency's jurisdiction to decide the merits of the *Armstrong* declaratory order proceeding before the Commission).

10. Description: This is a letter dated August 13, 1986, from R. James George, Jr., counsel for E&B, to Glenn Scammel, at the time an attorney in the ICC General Counsel's Office, regarding a proposed complaint in *E&B Carpet Mills*. Attached to it is an 11--page draft complaint for the E&B litigation.

Exemption: Same as Number 9, above.

11. Description: This is a 12-page draft complaint from William P. Jackson, Jr., counsel for E&B, for the E&B case.

Exemption: Same as Number 9, above.

The above-described documents were withheld pursuant to the (b)(5) exemption, which incorporates the executive and/or attorney work-product privileges. Release of documents 1, 2, 3, 4, 7, 8, 9, 10, and 11 would result in the disclosure of attorneys' mental impressions, conclusions, legal theories, or strategies regarding specific litigation. Documents 2, 3, 7, 9, 10 and 11 are communications with counsel who are on the same side in the E&B litigation where the Commission has intervened on E&B's side. These documents relate exclusively to the efforts of the parties to protect (through litigation) the agency's primary jurisdiction to decide the merits of the *Armstrong* case, and are not addressed to the substantive issue in *Armstrong* of whether the underlying transportation should have been found to be interstate (as opposed to intrastate) in nature. Documents 1, 4, 5, 6 and 8 are intra-agency memoranda, release of which would interfere with future open intra-agency discussion and could cause potential confusion.

In sum, I believe that release of the documents in question would have been inappropriate at the

time, and continues to be so now in light of pending administrative and judicial proceedings.

Respectfully submitted,

/s/ S. Arnold Smith
S. ARNOLD SMITH
FOI/Privacy Officer
Interstate Commerce
Commission

NOTARY

Subscribed and sworn before me this 20th day of February, 1987.

*/s/*_____

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

87-4725

STATE OF TEXAS,
Petitioner,

versus

UNITED STATES OF AMERICA,
and INTERSTATE COMMERCE COMMISSION,
Respondents.

Petition for Review of an Order of the
Interstate Commerce Commission

Before POLITZ, JOHNSON and HIGGINBOTHAM, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motion of the Quaker Oats Company, et al., intervenors in cause number 87-4702 for leave to late file their reply to the motion of the State of Texas to consolidate proceedings in cause number 87-4702 for leave to late file their reply to the motion of the State of

Texas to consolidate proceedings in cause number 87-4725 is GRANTED.

IT IS FURTHER ORDERED that petitioner's motion to consolidate the reference cause with cause number 87-4702 *Steere Tank Lines, Inc. v. ICC & U.S.A.*, is DENIED.

IT IS FURTHER ORDERED that the motion of Central Freight Lines Inc., for leave to intervene in support of petitioner is GRANTED.

IT IS FURTHER ORDERED that the motions of petitioner and intervenor Central Freight Lines Inc., to summarily reverse and vacate the Agency's decision are DENIED. However, the court makes no ruling on the questions presented by the motion. Rather, the court is persuaded that it will benefit from full briefing and oral argument of the case.

IT IS FURTHER ORDERED that the alternative motion of petitioner and intervenor for summary dismissal is DENIED.

APPENDIX E

GRAVES, DOUGHERTY, HEARON & MOODY
2300 INTERFIRST TOWER
POST OFFICE BOX 98
AUSTIN, TEXAS 78767
TELEPHONE: (512) 480-5600
(PORTIONS OF LETTERHEAD OMITTED)
May 21, 1987

Mr. John Dickson
District Clerk
Travis County Courthouse
Austin, Texas 78701

Re: No. 386,524 - The State of Texas v. E & B Carpet Mills, a Division of Armstrong World Industries, Inc., et al

Dear John:

Enclosed you will find our check for $5.00 for the jury fee provided by Rule 216, Texas Rules of Civil Procedure. By this letter, we are requesting that the above-styled and numbered cause be set for jury trial on Monday, December 7, 1987, at 9:00 a.m.

Yours sincerely,

GRAVES, DOUGHERTY, HEARON & MOODY
BY /s/ R. James George, Jr.
R. James George, Jr.

RJGjr/th
Enclosure

cc: Mr. Robert Patterson
Court Coordinator
Mr. Norberto Flores
Mr. James M. Doherty
Mr. Timothy J. Herman
Mr. Mert Starnes
Mr. Jerry Prestridge
Mr. William P. Jackson, Jr.
Mr. Jerome C. Finefrock
(w/o encl.

(5)

No. 87-1938

In the Supreme Court of the United States

OCTOBER TERM, 1988

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

STATE OF TEXAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the court of appeals abused its discretion in refusing to enjoin a state proceeding involving shipping operations that the Interstate Commerce Commission (ICC) has determined to be interstate transportation subject to the ICC's, rather than the state's, regulatory jurisdiction.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 837 F.2d 184.

JURISDICTION

The judgment of the court of appeals was entered on February 1, 1988. A petition for rehearing was denied on March 8, 1988 (Pet. App. 7a). The petition for a writ of certiorari was filed on May 26, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

E&B Carpet Mills, a division of Armstrong World Industries (Armstrong), manufactures carpet at its Dalton, Georgia facility and ships it by motor carrier to a service center at Arlington, Texas, where it is stored pending delivery to retail outlets located primarily in Texas. E&B

uses various carriers, including Reeves Transportation Company (Reeves), to transport carpet from Dalton to Arlington. It also employs Reeves (as well as other carriers) to ship carpet from Arlington to other points in Texas, including carpet that other carriers have transported from Dalton to Arlington. Pet. App. 2a, 15a-17a.

This case arises out of a dispute over whether the motor carriage from Arlington to other points in Texas is interstate transportation subject to exclusive ICC authority (see 49 U.S.C. 10521(a)(1)(A)) or intrastate transportation subject to state regulation (see 49 U.S.C. 10521(b)(1)). The State of Texas began an investigation of the shipments in 1985. Shortly thereafter, Armstrong and Reeves petitioned the ICC for a declaratory ruling that the carpet shipments were part of a continuous movement of goods in interstate commerce and therefore outside the state's regulatory authority. While the matter was pending before the ICC, Texas brought a state enforcement action alleging that carpet shipped from Dalton to Arlington without a "sidemark" indicating the ultimate Texas destination becomes intrastate commerce, subject to state regulation, when it is subsequently shipped from Arlington to other points in Texas. The state also intervened in the ICC proceeding and requested that the ICC postpone action pending the outcome of the state court suit. The ICC denied that request. Pet. App. 2a, 12a-13a.

The ICC ruled that the shipments from Arlington to other points in Texas were interstate and were thus within its exclusive regulatory jurisdiction (Pet. App. 12a-31a). Armstrong, joined by the ICC, then requested the United States District Court for the Western District of Texas to issue a preliminary injunction barring the Texas state court proceeding. The district court denied that request,

holding that the plaintiffs had failed to establish irreparable injury (*id.* at 48a-50a).[1] Texas's request to the ICC to reconsider its declaratory order was denied (*id.* at 32a-47a).

In October 1987, Texas filed a petition in the United States Court of Appeals for the Fifth Circuit for review, pursuant to the Administrative Orders Review Act, 28 U.S.C. 2341 *et seq.* (also known as the Hobbs Act), of the ICC's determination that the shipments were interstate. Shortly thereafter, the ICC filed a motion with the court of appeals requesting that it enjoin the state court proceeding pending review of the ICC's order.[2] The ICC claimed that the court of appeals has authority to issue such an injunction under the All Writs Act, 28 U.S.C. 1651.[3]

The court of appeals denied the ICC's request for a preliminary injunction (Pet. App. 1a-6a). The court first observed that the All Writs Act empowers it " 'to preserve the court's jurisdiction or maintain the status quo by injunction pending review of an agency's action through the prescribed statutory channels' " (*id.* at 3a, quoting *FTC* v.

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[1] None of the plaintiffs appealed that decision; however, the ICC later filed a new request for injunctive relief, which is still pending before that court (Pet. App. 2a-3a).

[2] The question precipitating Hobbs Act review of the agency order – namely, whether the ICC correctly determined that the shipments are interstate rather than intrastate – has been briefed and oral argument has been set for the week of September 5, 1988. The United States defended the ICC's position that the shipments involved here were interstate in nature; however the United States did not join in the ICC's motion to enjoin the state court proceeding.

[3] The All Writs Act provides: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law" (28 U.S.C. 1651(a)).

Dean Foods Co., 384 U.S. 597, 604 (1966)). It further noted, however, that "federal courts are to be cautious about infringing on the legitimate exercise of state judicial power" (Pet. App. 4a) and that "[i]t is difficult to see why an injunction is necessary to preserve our jurisdiction over th[is] case" (*ibid.*). As the court explained, "the state court does not have the power to review the ICC's order for error and the state court's interpretation obviously has no binding effect on our decision" (*ibid.*); instead, "the ICC seeks this injunction because it believes the enforcement proceeding interferes with its own jurisdiction, not ours" (*ibid.*). The court of appeals refused "to issue an injunction beyond that necessary to protect our own jurisdiction" (*id.* at 5a-6a) and accordingly denied the ICC's motion (*id.* at 6a).[4] The state court subsequently held that the shipments at issue here were intrastate rather than interstate and enjoined Armstrong and Reeves from conducting further shipments without first obtaining appropriate permits from the state regulatory agency (*id.* at 51a-53a).

ARGUMENT

The ICC petitions for a writ of certiorari to review the court of appeals' interlocutory order, entered in the course of a Hobbs Act proceeding, refusing to enjoin Texas's state court action against Armstrong and Reeves. As a threshold matter, the ICC has no statutory authority to file a petition for a writ of certiorari from the court of

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[4] The ICC filed a petition for rehearing with suggestion for rehearing en banc. The court of appeals denied the petition for rehearing (Pet. App. 7a). The clerk of the court returned, without filing, the suggestion for rehearing en banc "with the advice that the Court will not consider petitions for rehearing en banc of non-dispositive orders" (*id.* at 8a).

appeals' order; thus, the petition should be dismissed for lack of jurisdiction. In any event, the petition does not present an issue warranting this Court's review.

1. Since 1975, ICC orders have been subject to judicial review pursuant to the Hobbs Act, 28 U.S.C. 2341 *et seq.*[5] An aggrieved party commences the action by filing a petition in the court of appeals against the United States (28 U.S.C. 2344, 2347). The Hobbs Act then vests responsibility for defense of the suit in the Attorney General, who "is responsible for and has control of the interests of the Government in all court proceedings" (28 U.S.C. 2348). However, Congress has further provided that an agency subject to the Hobbs Act may also participate in the proceeding to defend its order (*ibid.*).[6] In addition,

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[5] Prior to 1975, ICC orders were subject to enforcement and review under the Urgent Deficiencies Act of 1913, ch. 32, 38 Stat. 219. See 28 U.S.C. (1970 ed.) 1336, 2321-2325. That Act empowered the district courts to enforce and review ICC orders and further provided that an action to enjoin an ICC order had to be heard before a three-judge panel and could be appealed directly to this Court (28 U.S.C. (1970 ed.) 2325). In 1975, Congress substantially revised those provisions, preserving the district court's jurisdiction to enforce ICC orders, eliminating judicial review by three-judge district courts, and vesting the courts of appeals with exclusive jurisdiction to review ICC orders in accordance with the Administrative Orders Review Act, 28 U.S.C. 2341 *et seq.*, which is more commonly known as the Hobbs Act. See Act of Jan. 2, 1975, Pub. L. No. 93-584, 88 Stat. 1917. See also H.R. Rep. 93-1569, 93d Cong., 1st Sess. 19-23 (1974) (indicating the relevant statutory revisions). The Hobbs Act procedures also control judicial review of certain final orders of the Federal Communication Commission, the Secretary of Agriculture and the Nuclear Regulatory Commission, and certain rules, regulations, and orders of the Secretary of Transportation and the Federal Maritime Commission (28 U.S.C. (& Supp. IV) 2342).

[6] Section 2348 states:

> The agency, and any party in interest in the proceeding before the agency whose interests will be affected if an order of the agency

Congress has provided that, in contrast to most other proceedings in which the United States is interested, "[t]he United States, the agency, or an aggrieved party may file a petition for a writ of certiorari" (28 U.S.C. 2350).[7]

Congress, through 28 U.S.C. 2350, has thus given the ICC a limited statutory authorization to file a petition for a writ of certiorari in Hobbs Act proceedings. But that authorization is strictly circumscribed by Section 2350's carefully drawn terms. Section 2350 permits a petition *only* from: (1) an interlocutory order of the court of appeals granting or denying an injunction of an agency order; or (2) a final judgment of the court of appeals on review of the agency order.[8] The ICC (or for that matter the United States or an aggrieved party) may not file a petition to review a court of appeals decision pursuant to 28 U.S.C. 2350 except from one of these two types of orders. The court of appeals' order in this case clearly

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> is or is not enjoined, set aside, or suspended, may appear as parties thereto of their own motion and as of right, and be represented by counsel in any proceeding to review the order. * * *

Thus, Congress has made a limited departure in Hobbs Act proceedings from the general rule that the Attorney General and his designees have exclusive authority to represent the federal government's interests in court. See 28 U.S.C. 515-519.

[7] This Hobbs Act provision represents a limited departure from the general rule, set forth in 28 U.S.C. 518(a), that the Attorney General and the Solicitor General shall have exclusive authority to represent the federal government's interests in this Court. See generally *United States* v. *Providence Journal Co.*, No. 87-65 (May 2, 1988).

[8] Section 2350(a) specifically provides:

> An order granting or denying an interlocutory injunction under section 2349(b) of this title and a final judgment of the court of appeals in a proceeding to review under this chapter are subject to review by the Supreme Court on a writ of certiorari as provided by section 1254(1) of this title. * * *

does not fit into either category. The order did not grant or deny an injunction of the ICC's declaratory order, it denied the ICC's request, under the All Writs Act, for an injunction of a state court proceeding; and the order was not a final judgment of the court of appeals on review of the ICC's declaratory order, it was purely interlocutory. Because the instant order does not fall within the terms of 28 U.S.C. 2350, and because Congress has not given the ICC independent litigating authority before this Court in any other circumstance, the ICC's petition for a writ of certiorari in this case should be dismissed for lack of jurisdiction. See *United States* v. *Providence Journal Co.*, No. 87-65 (May 2, 1988).[9]

2. Apart from the jurisdictional impediment, the ICC petition does not present a question warranting this Court's review. The only question presented at this time

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[9] The ICC contends (Pet. 1 n.1) that 28 U.S.C. 2323 and 2348 authorize the filing of its petition in this case. But those two provisions, by their terms, simply authorize the ICC and other interested entities to "appear as parties" in district court actions to enforce ICC orders (28 U.S.C. 2323) and – as noted above – in Hobbs Act actions to review ICC orders (28 U.S.C. 2348). They do not overcome the specific and express limitations on Supreme Court review set forth in their sister provision, 28 U.S.C. 2350. It is, of course, safe to assume that Congress did not intend "to paralyze with one hand what it sought to promote with the other." *Clark* v. *Uebersee Finanz-Korporation, A.G.*, 332 U.S. 480, 489 (1947). If Sections 2323 and 2348 were read as the ICC apparently urges, they would render Section 2350's limitations completely meaningless. The ICC's reliance (Pet. 2 n.1) on a law review article (Stern, *"Inconsistency" in Government Litigation*, 64 Harv. L. Rev. 759 (1951)), which this Court cited for illustrative purposes in *Providence Journal Co.* (slip op. 11-12 n.9), is also misplaced. The article, which was written nearly 40 years ago, addresses judicial review of ICC orders under the Urgent Deficiencies Act of 1913 (see note 5, *supra*). It does not address the ICC's authority to seek Supreme Court review of collateral court orders of the type involved here.

is whether the court of appeals abused its discretion in refusing to enjoin a state court proceeding. That refusal does not reflect clear error, nor does it implicate a matter of great consequence. Moreover, as the court of appeals noted, the ICC may follow other avenues to obtain the relief it seeks.

As an initial matter, the United States agrees that once the ICC commenced an administrative proceeding to determine whether the shipments at issue here were interstate transportation subject to the ICC's jurisdiction, Texas should have dismissed its state court enforcement action against Armstrong and Reeves or held it in abeyance pending the ICC's decision. As this Court explained in *Service Storage & Transfer Co.* v. *Virginia*, 359 U.S. 171 (1959), interpretations of this character should be made in the first instance by the agency "upon whom the Congress has placed the responsibility of action" (*id.* at 177). The ICC proceeding is the preferable forum for resolving the dispute because "the possibility of a multitude of interpretations of the same federal certificate by several States will be avoided and a uniform administration of the Act achieved" (*id.* at 179). If the state is unsatisfied with the ICC's determination, it can seek judicial review, as Texas has done here, under the Hobbs Act.

That being said, however, the United States cannot also say that the court of appeals clearly abused its discretion in refusing the ICC's request under the All Writs Act to enjoin Texas's state court enforcement action against Armstrong and Reeves. We have no doubt that the court of appeals *may* provide such relief in this situation. Upon motion by an appropriate party,[9] the federal court could

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[9] As previously noted, it is the Attorney General, rather than the ICC, who "is responsible for and has control of the interests of the Government in all court proceedings under this chapter" (28 U.S.C 2348). We do not address in this case whether the Attorney General,

reasonably conclude that an injunction of the state court proceedings would be "appropriate in aid of [its] jurisdiction []" (28 U.S.C. 1651(a)). The injunction would, for example, preserve the status quo in light of the ICC's presumptively correct order. See *Dean Foods Co.*, 384 U.S. at 604. In addition, the requested injunction would be "agreeable to the usages and principles of law" (28 U.S.C. 1651(a)), particularly in light of this Court's decision in *Service Storage & Transfer Co.*, which gives the ICC primary jurisdiction over the matter in issue. But the federal court's ultimate decision whether to exercise its powers under the All Writs Act in this situation rests largely with the court's informed judgment and discretion. See, *e.g, Kerr* v. *United States Dist. Ct.*, 426 U.S. 394, 403 (1976). The court observed here that the injunction is not "necessary to preserve our jurisdiction over the case" (Pet. App. 4a). While that is not a necessary precondition for the requested injunction, it is a substantial basis under the circumstances to justify the denial of discretionary injunctive relief.

In addition, the denial of injunctive relief here is not a matter of such great consequence that it demands this Court's immediate attention. The decision has limited precedential effect in light of the highly discretionary nature of the requested remedy. The denial of relief works the most immediate hardship upon the shipper and the carrier. Those parties, however, neither requested an in-

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rather than the agency, is the proper party to determine whether to seek an injunction against a pending state court proceeding in order to protect the ICC's primary jurisdiction as recognized in *Service Storage & Transfer Co.* We simply note that the United States clearly can seek such an injunction in appropriate circumstances. See *Leiter Minerals, Inc.* v. *United States*, 352 U.S. 220, 225-226 (1957). See also *NLRB* v. *Nash-Finch Co.*, 404 U.S. 138, 142-148 (1971) (holding that the NLRB may bring an action to enjoin a state court proceeding).

junction in the court of appeals nor petitioned for a writ of certiorari in this Court (although they have supported the ICC's petition). Moreover, the ICC, the shipper, and the carrier are not without other remedies. They can request the Texas appellate courts to enforce this Court's holding in *Service Storage & Transfer Co.* And as provided by 28 U.S.C. 1336(a) and 28 U.S.C. 2321(b), they can bring an appropriate action in federal district court to enforce the ICC's declaratory order. In fact, the ICC has pending a request for injunctive relief before the district court (see note 1, *supra*). Finally, if the court of appeals affirms the ICC's order, the parties can initiate a new request for an injunction, either in that court or in the district court, to effectuate the court of appeals' ruling.

CONCLUSION

The petition for a writ of certiorari should be dismissed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

AUGUST 1988

U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60600

No. 87-1938

In the Supreme Court of the United States

OCTOBER TERM, 1987

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

STATE OF TEXAS, ET AL., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY TO OPPOSITION

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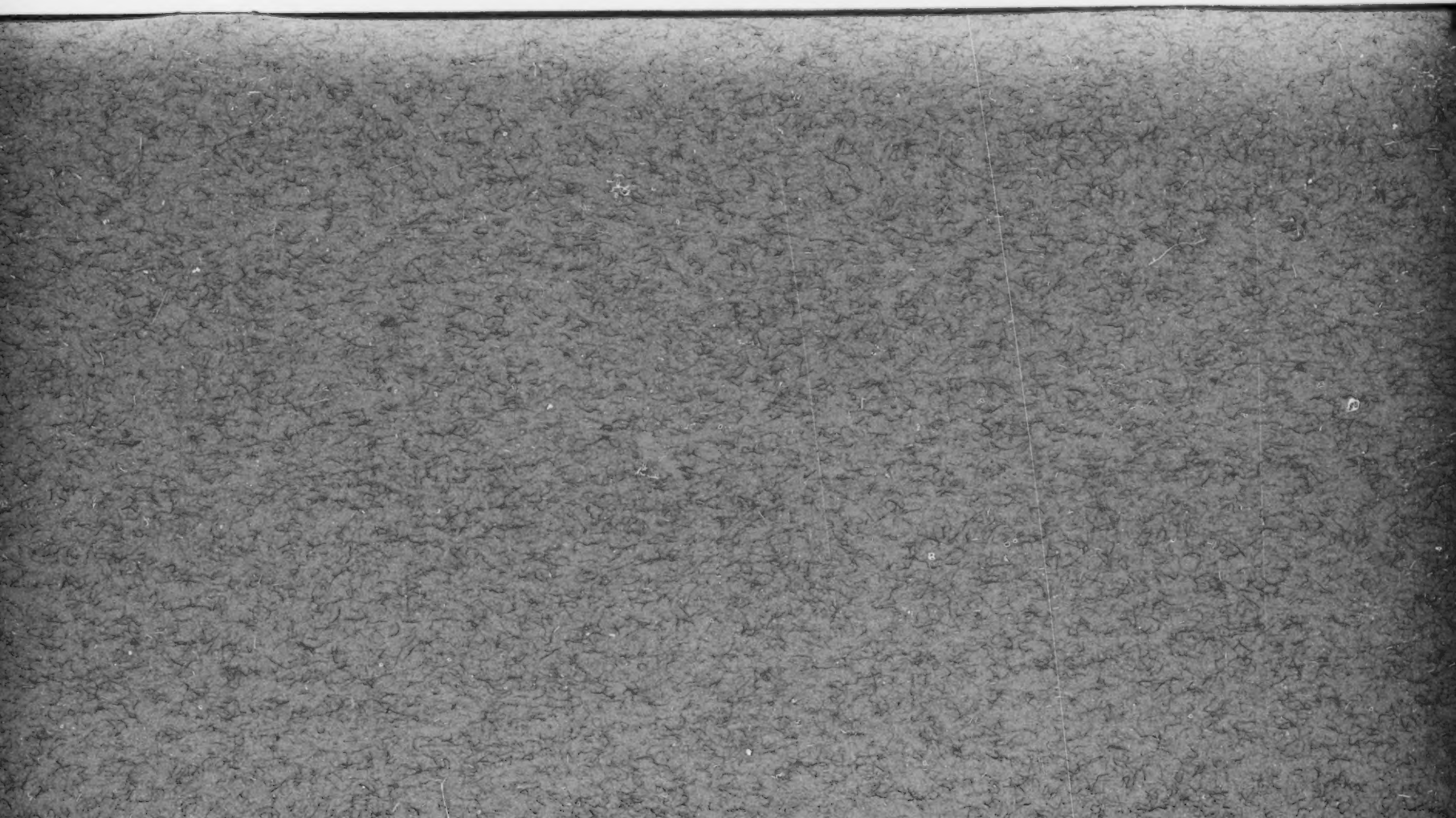

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OCTOBER TERM, 1987

No. 87-1938

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

STATE OF TEXAS, ET AL., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY TO OPPOSITION

The Interstate Commerce Commission's petition seeks to have the principle of *Service Storage & Transfer Co. v. Virginia,* 359 U.S. 171 (1959) upheld and enforced by removing a State obstruction to the use of a Federal license while the scope of that license is in litigation.

The objections raised fall into five general categories. First, Texas attempts to limit *Service Storage* to transportation which is "facially interstate." Second, Texas argues that the matter is not justiciable or that the Federal courts should abstain from resolving it. Third, Texas maintains that relief under the All Writs Act is not available, while the Solicitor General asserts that relief, although appropriate, was not required.

Fourth, both the Solicitor General and Texas argue that the ICC cannot seek a writ of *certiorari* in this case. Finally, Texas and the Solicitor General both argue (for different reasons) that review at this time is not appropriate.

None of these arguments either precludes or counsels against granting the ICC's petition.

1. At the heart of the matter, Texas disputes the premise of *Service Storage*—that the ICC has primary jurisdiction to determine the transportation authorized by its certificates.

Texas would limit *Service Storage* to transportation that is "facially *inter*state." It claims that this case is "facially *intra*state" because the disputed movement does not cross State lines. But that claim *presupposes* that the disputed movement is separate from, not a continuation of, the first leg of the movement of goods involved here (which clearly crosses State lines).[1] Thus, Texas' standard for allocating primary jurisdiction between the ICC and the States is not workable; it requires a determination on the ultimate issue in dispute (and would let the State make that determination).

Here, the ICC has interpreted the reach of its license, as it has sole authority to do under *Service Storage*. The State can challenge the ICC's conclusion under the Hobbs Act, as it is currently doing before the United States Court of Appeals for the Fifth Circuit. It cannot choose to ignore the ICC's ruling and proceed with an inconsistent State enforcement action. As explained in the petition (at 6), that violates both the Supremacy and Commerce Clauses of the Constitution, as well as this Court's decision in *Service Storage*.

2. The process established by this Court in *Service Storage* warrants and requires protection by the Federal courts. The ICC exercised its declaratory order authority under 5 U.S.C. 554(e) to "terminate a controversy or remove uncertainty," which can be used in lieu of an ad-

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[1] On the first leg, the goods are shipped from Georgia into Texas under a bill-of-lading bearing a "storage-in-transit" notation that plainly shows there will be a second leg to the move.

judication and with the same effect.[2] *See Weinberger v. Hynson, Wescott & Dunning,* 412 U.S. 609, 625-27 (1973). The ICC order in this case determined rights by declaring the lawfulness of the pattern of transportation described in it.[3] As a determination of Federal law by the appropriate Federal authority, the ICC's decision is binding on the State.[4]

There is no basis for abstention by the Federal courts here. The States have no legitimate role in determining the scope of a Federal license.[5] *See Service Storage, supra.*

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[2] Contrary to Texas' suggestion (Opp. at 25), such a ruling is fully reviewable by the Federal courts. *Frozen Food Express v. United States,* 351 U.S. 40, 45 (1956).

City of Miami v. ICC, 669 F.2d 219 (5th Cir. B 1982) ruled on the finality of a particular ICC order and "should not be read as . . . suggest[ing] that an ICC declaratory order is never reviewable . . . ."669 F.2d at 222. The other cases cited by Texas either did not involve a declaratory order, *United States v. Los Angeles R.R.,* 273 U.S. 299 (1927), or were found to be final and reviewable, *Marine Terminal v. Rederi. Transatlantic,* 400 U.S. 62 (1970).

[3] Texas wrongly characterizes the ICC's decision as purely advisory (Opp. at 23-25). While the decision was limited in scope, it was not abstract in nature.

The ICC decisively ruled that the described pattern of transportation is authorized by the carrier's ICC license. But the ICC did not conduct a factual investigation of whether each and every movement ever conducted by the parties conformed to the pattern described.

As noted in the ICC petition (at 4, n.7), Texas can challenge (before the ICC) the *factual predicate* of the order and seek an ICC ruling that any *other* specific pattern of transportation for any particular shipments is not covered by the ICC license.

[4] *See Mississippi Power & Light Co. v. Mississippi,* __ U.S. __, 56 U.S.L.W. 4751, 4756 (June 24, 1988); *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.,* 450 U.S. 311, 318-19 (1981). *Compare, Pennzoil v. Texas,* __ U.S. __, 107 S.Ct. 1519 (1987) (Texas Opp. at 23), involving a Federal court's interpretation of a *State* statute.

[5] *New Orleans Public Service v. City of New Orleans,* 798 F.2d 858 (5th Cir. 1986), *cert. denied,* __ U.S. __, 107 S.Ct. 1910 (1987) (Texas

3. As recognized by the Solicitor General (U.S. Opp. at 8), an injunction under the All Writs Act (28 U.S.C. 1651) is appropriate to protect the *Service Storage* process.[6] Indeed, the primary purpose of the All Writs Act is to fill in the gaps that threaten to thwart the proper exercise of Federal court jurisdiction. *Pa. Bureau of Correction v. U.S. Marshals,* 474 U.S. 34, 41 (1985), citing *McClung v. Silliman,* 6 Wheat. 598 (1821) and *McIntire v. Wood,* 7 Cranch 504 (1813). As explained in the petition (at 8), the jurisdiction of the court of appeals embraces that of the Federal agency that issued the order under review. See 28 U.S.C. 2349. The State court should not be allowed to *usurp* Federal jurisdiction over the matter in dispute. Under the circumstances, the Federal court should not hesitate to invoke the All Writs Act.

The ICC's request was properly brought under the All Writs Act. *See FTC v. Dean Foods Co.,* 384 U.S. 597, 605 (1966). Contrary to Texas' claim (Opp. at 11), it was not a request for direct enforcement (*i.e.* execution of the terms) of an ICC order, for which an action would lie in district court under 28 U.S.C. 1336(a).[7] Indeed, the ICC decision

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Opp. at 23) is not pertinent. That case arose in a context where "[n]o one disputes that the [City] Council can set retail rates. NOPSI only asks that the Council recognize FERC-determined costs *within the Council's rate-making proceeding.*" *Id.* at 863 n.1 (emphasis added).

Public Serv. Comm'n v. Wycoff, 344 U.S. 237 (1952) (Texas Opp. at 17) is also inapposite. There the Court found no actual controversy, a prerequisite for a declaratory judgment *by a court* under 28 U.S.C. 2201, largely because no enforcement action had been taken by the State agency.

[6] Contrary to Texas' claim (Opp. at 23, n.17), an injunction is not barred by the Anti-Injunction Act (28 U.S.C. 2283) since it is sought by a Federal agency, as the court below acknowledged (Pet. at 3a-4a). See *Leiter Mineral, Inc. v. United States,* 352 U.S. 220, 225-26 (1957).

[7] The private parties' district court action (see Pet. at 4, n.6) was brought under 28 U.S.C. 1331 (Federal question jurisdiction) and 42 U.S.C. 1983 (State actions in deprivation of Constitutional rights), *not* 28 U.S.C. 1336 (violation of an ICC order).

does not require enforcement because it does not order any action to be taken; it merely declares certain transportation to be interstate.

But even if enforcement of the ICC's order were involved, that would not preclude use of the All Writs Act here. Once the circuit court received a proper petition to review the agency's order, it obtained full jurisdiction over the case. See 28 U.S.C. 2349. It need not carve out and eschew particular aspects of the case, reserving them for separate district court consideration.[8] Moreover, since the circuit court's responsibilities extend to whether or not to suspend the ICC order (see 28 U.S.C. 2349), they necessarily encompass protection of the binding effect of an ICC order that is *not* suspended. *See Rochester Telephone Corp. v. United States,* 307 U.S. 125, 143 (1939) (a distinction between "negative" and "affirmative" orders serves no useful purpose).

As we have demonstrated (Pet. at 10, n.23), all the requirements for a preliminary injunction are met here.[9] Indeed, the Solicitor General expresses "no doubt that the court of appeals *may* provide such relief in this situation" (U.S. Opp. at 8).

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[8] For example, even though district courts are assigned jurisdiction to review ICC orders for payment of money, under 28 U.S.C. 2321(b), circuit courts routinely hear challenges to reparation orders when the decision under review contains other forms of relief that are assigned to circuit courts for review under 28 U.S.C. 2321(a). *See, e.g., Pullman-Standard, A Div. of Pullman Inc. v. I.C.C.,* 705 F.2d 875, 880-881 (7th Cir. 1983), citing *ICC v. Atlantic Coast Line R. Co.,* 383 U.S. 576, 596-97 (1966).

[9] The courts need not conduct a "clean hands" inquiry (see Texas Opp. at 15) before affording the relief requested here. The mere *allegations* of misconduct (which we maintain are unwarranted) do not deprive the ICC's order of its normal full force and effect. There is a presumption of regularity in the official acts of public officials. *United States v. Chemical Foundation,* 272 U.S. 1, 14-15 (1926).

Acknowledging that injunctive relief would have been appropriate, the Solicitor General argues that the circuit court's exercise of discretion should not be disturbed.[10] However, the circuit court's denial here was not based upon discretionary considerations, but rests upon its failure to acknowledge the basic principle of *Service Storage* and the scope of its jurisdiction over this case. See Pet. at 5-8.

4. The Solicitor General (U.S. Opp. at 5-7) and Texas (Opp. at 7-8) argue that the ICC lacks authority to bring its petition to this Court. They rely upon *United States v. Providence Journal Co.*, 56 U.S.L.W. 4366 (May 2, 1988) for the proposition that, absent an explicit statutory exception, only the Solicitor General can represent the Federal government's interests in this Court.

As the Solicitor General (but not Texas) recognizes, the ICC may represent its own interests in Hobbs Act cases. 28 U.S.C. 2348, and may bring a petition for a writ of certiorari under 28 U.S.C. 2350 without the Solicitor General. *See also,* Stern, *"Inconsistency" in Government Litigation*, 64 HARV. L. REV. 759 (1951), cited with apparent approval in *Providence Journal,* 56 U.S.L.W. at 4370 n.9.

The Solicitor General argues, however, that the ICC, is strictly limited in its access to this Court by the express language of 28 U.S.C. 2350. Stated differently, the Solicitor General takes the position that 28 U.S.C. 1254(1), upon which the ICC based its petition, is not available to the ICC because it is an agency covered by the Hobbs Act, 28 U.S.C. Chapter 158.[11] This approach

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[10] The Solicitor General accepts the court's explanation that its jurisdiction was not threatened, even though "that is not a necessary precondition for the requested injunction" (U.S. Opp. at 9).

[11] The Solicitor General does *not* argue that Section 1254(1) would be unavailable even to him in a Hobbs Act case. Section 1254(1) invests this Court with plenary authority to consider petitions from *any*

overlooks the reach of the special grant of independent litigating authority in Chapter 157, at 28 U.S.C. 2323, which accords separate "party" status to the ICC "as of right" in *any* action "involving the validity of [an ICC] order or requirement."

The Solicitor General's interpretation is also belied by the legislative history of the amendment bringing review of ICC orders under the Hobbs Act. ICC concerns about its historic litigating authority, and especially its authority to come before this Court, were a major consideration in Congress' debate on the legislation to substitute Hobbs Act review for review of ICC orders under the Urgent Deficiencies Act of 1913. See H.R. REP. NO. 1569, 93d Cong. 1st Sess. (1974), reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7925 (Report). See also, *Judicial Review of Decisions of the ICC: Hearing on S. 663 Before the Subcomm. on Improvements in Judicial Machinery, Comm. on the Judiciary,* 93d Cong., 1st Sess. (1973) (Hearing).

To alleviate these concerns Congress asked for and received assurances from the Department of Justice that the passage of S. 663 would not truncate the ICC's ability to participate independently in actions involving its orders. Hearing, *supra* at 32. Specifically, then Solicitor General Bork stated that "the Commission would continue to have the same authority to represent itself independently in the Supreme Court under S. 663 that it now has under the Urgent Deficiencies Act. That authority includes the right to file petitions for certiorari and to oppose such petitions when filed against it." Report, *supra* at 10-12.

The Senate Committee stated that it agreed with the Solicitor General that the ICC would continue to be able to present its views independently and "intends that the bill

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party to *any* civil case, *before* or after rendition of judgment. Other statutory provisions for review on certiorari "merely overlap § 1254(1) without in any way detracting from it." Stern, Gressman and Shapiro, *Supreme Court Practice* 40 (6th ed. 1986).

have this effect." S. REP. NO. 500, 93d Cong., 1st Sess. 7 (1973). The House Committee, after restating the ICC's concerns, stated even more emphatically (Report, *supra* at 9):

> Objectively, it is difficult to perceive what more the Congress may do legislatively to protect the rights of the ICC and aggrieved parties to be shielded from caprice without squandering the primary intent of this legislation. The ICC may still intervene at any level as a matter of right and be represented by its counsel; the Attorney General may not terminate a proceeding over their objection; they may initiate, take part in or continue proceedings without regard to the action or inaction of the Attorney General; and they may file a petition for a writ of certiorari if they so choose. 28 U.S.C. §§ 2348, 2350. The intent and meaning of the provisions could not be stated with more clarity; the Committee is compelled to conclude that any such activity on the part of the Attorney General, resulting in an abridgement of any of those statutorily-conferred rights and whether witting or unwitting, would be subject to challenge in court. Moreover, the ICC has twice received the assurance of the Department, through the Solicitor General and the Assistant Attorney General for Legislative Affairs (see Letters attached to this Report), that the independence of the Commission with respect to its ability to participate fully and equally in all proceedings affecting its interests will not be tampered with in any respect.

5. Review now is not only appropriate but imperative, and as pointed out in our petition (at 9 n.20) ultimately will save this Court's time by obviating future petitions.

Contrary to Texas' assertion (opp. at 8-10), the controversy now before the Fifth Circuit is wholly separate. The Fifth Circuit is considering whether the ICC properly determined that the movements at issue are part of inter-

state transportation. The controversy *here* is limited to whether the carrier can exercise its Federal license (in the manner permitted by the ICC) *during litigation*. This issue does not depend in any way upon whether the transportation is ultimately ruled to be inter- or intrastate.[12]

The Fifth Circuit has made its final ruling on the issue presented here, and has given no indication that it might revisit the matter. Indeed, the court stated that even *if* it had already affirmed the ICC's decision, it would not be compelled to enjoin the State prosecution. See Pet. at 4a. Thus, there is no reason to await a further decision by the Fifth Circuit before resolving the controversy presented here.[13] Moreover, given the element of timing in the issue presented (*i.e.* whether the ICC decision is binding upon the States *during litigation*), there must be immediate (interlocutory) review to afford effective relief.

As shown in the ICC's petition (at 9-10), this matter clearly meets the criteria for interlocutory review. The Solicitor General suggests that the ICC has other

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[12] One issue in common is Texas' challenge to the ICC's primary jurisdiction. This Court need not await a circuit court ruling on that issue. The ICC's primary jurisdiction is well-established by the controlling precedent of this Court.

[13] The Fifth Circuit's decision will not necessarily resolve this dispute. If it affirms the ICC, there is no reason to believe that the State court injunction would immediately be lifted, particularly if Texas seeks further review. Nor is there any reason to believe that the Fifth Circuit would then enjoin the State court action, given the court's statement that an affirmance would not compel an injunction.

If, on the other hand, the Court of Appeals should find the ICC's procedures and/or analysis flawed, it would remand the case to the agency. It could then be several more years before a new ICC decision could be issued and any court review of it completed.

Even if the Fifth Circuit were to conclude that the transportation *could not* be part of interstate transportation, the issue presented here would not be rendered moot. Otherwise, this important issue, which is clearly capable of repetition (see Pet. at 7-8, n.16), could evade review.

remedies, *viz.* continued appeals to the same three forums (Texas court system, Federal district court and Fifth Circuit) that have already declined to acknowledge and/or enforce the *Service Storage* principle in this case. Such remedies are wholly illusory and to suggest pursuing them ignores the crucial timing element in the issue presented. Thus, the Court can and should review this matter now.

CONCLUSION

In sum, the ICC's petition is proper and presents a compelling case for review and immediate correction. The ICC again urges the Court to grant its petition for a writ of certiorari and, because the decision below is so clearly at odds with *Service Storage,* summarily reverse the lower court's denial of preliminary injunction.

Respectfully submitted,

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